No. 92-1837

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent of Washington State Penitentiary, Walla Walla, Washington,

Petitioner,

vs.

CHARLES R. CAMPBELL,

Respondent.

ON PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit violate its duty to promptly decide the appeal of Charles Campbell's second capital habeas petition by postponing consideration of the appeal and issuing an interlocutory order requiring the district court to conduct a second evidentiary hearing when: (1) the appeal has been pending before the Ninth Circuit for more than four years; (2) the district court conducted a full and fair evidentiary hearing in 1989; and (3) the Ninth Circuit has not ruled the original evidentiary hearing was in any way defective?

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No.

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ON PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James Blodgett respectfully prays that an extraordinary writ of certiorari, or, in the alternative, prohibition or mandamus, issue to summarily vacate the April 28, 1993

order of the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1651(a), the All Writs Act.[1]

I. OPINIONS BELOW[2]

In its April 28, 1993 order, the Ninth Circuit, sitting *en banc*, remanded Campbell's second habeas corpus petition to the district court for another evidentiary hearing because the *en banc* court "has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment." *See* Appendix 1.[3] Prior to seeking relief in this Court, the State filed an emergency motion with the Ninth Circuit, requesting that the court reconsider and vacate its order of remand and decide Campbell's second appeal without further delay. The Ninth Circuit denied that motion, with Circuit Judges O'Scannlain and Kleinfeld dissenting, on May 7, 1993. *See*

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[1]Petitioner will be referred to hereafter as the State.

[2]Other pertinent opinions in this case were previously provided to this Court as appendices in the State's 1991 mandamus petition. *See* Petition for Writ of Mandamus, *In re Blodgett*, No. 91-716.

[3]The district court has scheduled the evidentiary hearing for May 24-26, 1993. The holding of the evidentiary hearing will not render this petition moot because the State will be prejudiced both by the evidentiary hearing itself and the subsequent appellate review of the results of that hearing by the Ninth Circuit. The State has not requested a stay of the Ninth Circuit's order because the State refuses to contribute to further delay and is fully prepared to proceed with the defense of Campbell's claims regarding hanging.

Appendix 2. Consequently, the State has exhausted all other possibilities of vacating the order of remand.[4]

II. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a)[5] and United States Supreme Court Rule 20.1.

III. STATEMENT OF THE CASE

A. Procedural History – 1982 to 1989

Campbell was convicted and sentenced to death for the brutal slaying on April 14, 1982 of two women and an eight-year old girl. The Washington Supreme Court affirmed his conviction and death sentence on direct review, and this Court denied certiorari. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). Campbell's

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[4]On May 10, 1993, the State filed an Application with Circuit Justice O'Connor to vacate the Ninth Circuit's interlocutory order of remand. The Application, containing arguments virtually identical to those in this petition, was denied without prejudice because Justice O'Connor determined that only the full Court could grant the relief requested by the State. *See Blodgett v. Campbell*, No. A-851. The State respectfully requests this Court to consider any response to the State's Application filed by Campbell as his response to this petition, thereby allowing the Court to rule on this petition immediately.

[5]28 U.S.C. § 1651(a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

first federal habeas corpus petition was denied after an evidentiary hearing. The Ninth Circuit affirmed the district court's denial of Campbell's first habeas petition and this Court denied certiorari. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

On February 15, 1989, the trial court issued a death warrant setting Campbell's execution for March 30, 1989. Campbell, represented by counsel, filed a notice of appeal and motion for stay of execution, raising *inter alia* several conclusory and factually unsupported challenges to hanging as an execution method. On March 23, 1989, the Washington Supreme Court rejected all of Campbell's challenges to hanging as a method of execution. In a unanimous opinion, the court upheld the constitutionality of hanging as a method of execution, declining to revisit *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). *See State v. Campbell*, 112 Wn.2d 186, 192, 770 P.2d 620 (1989). The Court also denied Campbell's motion for a stay of execution in an unpublished opinion, concluding that none of the issues raised warranted further consideration.

B. Procedural History – 1989 to Present

The delays and difficulties the State has faced in Campbell's case have all centered around the Ninth Circuit's actions and inaction from March 28, 1989 to the present in Campbell's second habeas corpus petition. The following is a summary of the relevant federal court procedural history in Campbell's second habeas case:

1. *March 24, 1989*: The United States District Court for the Western District of Washington (Coughenour, J.) summoned the attorneys representing Campbell and the State to chambers to discuss whether and when Campbell would be filing a second federal habeas corpus petition and motion for a stay of execution.[6] The district court noted that it had already reviewed copies of the state court briefs and opinions, fully apprising itself of the issues likely to be raised in Campbell's second habeas petition.

Campbell's attorneys informed the court that they intended to file a federal habeas petition and a motion for a stay of execution the following Monday, March 27, 1989. The district court instructed the parties that they should be prepared to conduct an evidentiary hearing at that time, but did not in any way limit the issues Campbell could raise or the evidence he could present in support of his petition. The court further ordered Campbell's presence at the evidentiary hearing and requested that Campbell's former trial counsel also be available regarding the ineffective assistance of counsel claim. Campbell's attorneys indicated that conducting the evidentiary hearing the following Monday would be "difficult," but they voiced no specific objection to the court's expedited schedule nor did they

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[6]Judge Coughenour had presided over the proceedings in Campbell's first federal habeas petition in 1985-86. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). The entire state court record was lodged with the court in those proceedings, and the court conducted a thorough review of that record (and held an evidentiary hearing) before ruling on the merits of Campbell's first petition. Thus, the district court was fully capable of conducting a hearing on the merits of Campbell's second habeas petition in connection with the motion for a stay of execution.

indicate what evidence, if any, they would be unable to present on March 27, 1989.

2. *March 27, 1989*: Campbell filed his second federal habeas petition, which included three claims pertaining to hanging as an execution method as well as a motion for stay of execution.[7] At the evidentiary hearing held by the district court on his petition, Campbell offered several affidavits, the testimony of three witnesses, and the testimony of both Campbell's former trial counsel. However, despite the district court's willingness to receive evidence on all of Campbell's claims, none of this evidence pertained to Campbell's hanging claims. Instead, Campbell focused exclusively on the claims concerning his

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[7]The text of Campbell's execution method claims is as follows:

> 5.16 Petitioner will be deprived of his right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States because his execution will be conducted by hanging pursuant to RCW 10.95.180.
>
> 5.17 Petitioner will be deprived of his right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States because petitioner's execution will be by hanging and the State of Washington does not have any person who is qualified to perform an execution by hanging.
>
> 5.18 Petitioner will be deprived of his right against cruel and unusual punishment and freedom of religion under the First and Eighth Amendments to the Constitution of the United States by forcing petitioner to choose death by lethal injection over hanging when petitioner is terrified at the thought of being executed in such a fashion and the possibility of his death being painful and lengthy and petitioner's religious beliefs forbid him from participating in his own demise by electing death by lethal injection over hanging.

waiver of presence at voir dire and his allegations of ineffective assistance of counsel.

The district court explained to Campbell's habeas counsel that it would fully consider the affidavits to be part of the record and repeated its invitation to Campbell to present whatever evidence he desired. The district court also permitted Campbell himself to orally present any additional arguments that were not made by his attorneys and allowed Campbell to take an active role in the presentation of his case. The district court reminded Campbell "[y]ou're going to have a ruling, but I want to make certain that you have the opportunity to present to me what you want to present before I give you that ruling."

During the evidentiary hearing, and in response to statements made by Campbell's counsel and one of the witnesses, the district court reminded the parties of their roles as well as that of the court:

> If you had the opportunity to have been present at last Friday's [status] hearing, I think you would agree that the Court was trying to accommodate counsel and telling counsel that if you wanted to put on evidence, I'd be happy to hear it and setting everything aside so that we could accomplish that. I'm not forcing anybody to go through with this hearing. If you don't want to go forward with putting on evidence, that is fine. We'll stop right now.

Although the district court did not limit Campbell's evidentiary presentation in any way, Campbell offered no evidence and made no offer of proof in support of his three claims regarding hanging. Despite the fact that he was present throughout the entire hearing, Campbell did not testify.

Later that day, after Campbell and his attorneys informed the court that they had no further evidence or arguments to present, the district court issued its Order denying both Campbell's motion for a stay of execution and his petition for writ of habeas corpus. The court rejected Campbell's purely legal challenge to hanging (Claim 5.16), concluding that he had not made a "substantial showing of the violation of a federal right." With respect to Campbell's other two challenges (lack of a qualified hangman and objection to the choice between hanging and lethal injection), the district court observed that Campbell had provided no factual support for his allegations.

3. *March 28, 1989*: Campbell appealed the denial of his second federal habeas petition to the Ninth Circuit and requested a stay of execution. The Ninth Circuit immediately stayed Campbell's execution pending disposition of his appeal. This stay has remained in effect throughout the remainder of the proceedings in Campbell's second appeal.

4. *June 27, 1989*: Oral argument was held before the Ninth Circuit on Campbell's appeal of his second habeas corpus petition.

5. *April 30, 1990*: The State requested that the Ninth Circuit inform the parties as to when the court anticipated reaching a decision in the Campbell case. The court did not respond to the State's inquiry.

6. *October 5, 1990*: The State again requested information from the Ninth Circuit regarding the status of Campbell's second appeal. The Court did not respond to the State's renewed inquiry.

7. *February 21, 1991*: The Ninth Circuit *sua sponte* ordered Campbell's second appeal withdrawn from submission pending the responses of the parties as to whether Campbell had exhausted all claims in his second petition. *Campbell v. Blodgett*, 927 F.2d 444 (9th Cir. 1991).

8. *March 4, 1991*: The State filed a response to the Ninth Circuit's order, demonstrating that Campbell had exhausted his available state remedies and urging the Ninth Circuit to resubmit the case for decision. Counsel for Campbell conceded exhaustion as well.

9. *June 3, 1991*: Campbell gave notice of his intent to file a third federal habeas corpus petition.

10. *August 7, 1991*: The Ninth Circuit granted Campbell's previous motion to dismiss counsel, but denied Campbell's motion to withdraw several issues from appeal. The Ninth Circuit also delayed resolution of the second appeal pending the filing and disposition of Campbell's third habeas corpus petition. *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991).

11. *September 13, 1991*: Campbell filed his third petition for writ of habeas corpus.

12. *October 25, 1991*: The State filed a petition for a writ of mandamus in this Court. The petition requested this Court to compel the Ninth Circuit to decide Campbell's second habeas appeal without further delay.

13. *January 13, 1992*: This Court issued its opinion denying the petition for a writ of mandamus, "without prejudice to the right of the State to again seek mandamus relief or to request any other extraordinary relief by motion or petition if

unnecessary delays or unwarranted stays occur in the panel's disposition of the" Campbell case. *Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 677 (1992).

14. *January 15, 1992*: The State moved the Ninth Circuit to resubmit the Campbell appeal and to render a prompt decision.

15. *January 16, 1992*: The Ninth Circuit directed the parties to inform the panel of the status of Campbell's third habeas petition and, inexplicably, whether the parties believed the Court should defer decision on the second habeas petition until the district court reached a decision on the third petition.

16. *January 23, 1992*: The State objected to the Ninth Circuit's order and renewed its motion for resubmission and a prompt decision on the second habeas petition. The State argued that the stay of execution carries with it a duty to promptly decide the matter.

17. *March 6, 1992*: The Ninth Circuit ordered the resubmission of Campbell's second appeal.

18. *March 9, 1992*: The district court dismissed Campbell's third habeas corpus petition as a successive petition and an abuse of the writ.

19. *April 1, 1992*: The Ninth Circuit panel issued its opinion affirming the district court's denial of Campbell's second habeas petition. *Campbell v. Blodgett*, 978 F.2d 1502 (9th Cir. 1991).

20. *April 13, 1992*: Rejecting the State's objections to any further extensions of time, the Ninth Circuit granted Campbell's motion for extension of time to file petition for rehearing on the second habeas petition.

21. *April 22, 1992*: The State moved the Ninth Circuit to vacate the stay of execution. The State also moved the Ninth Circuit to vacate the district court's issuance of a certificate of probable cause. In the alternative, the State moved the Ninth Circuit to conduct an expedited review of the third habeas petition.

22. *May 5, 1992*: The Ninth Circuit denied the State's motions to vacate the issuance of the certificate of probable cause, to vacate the stay of execution, and for expedited review.

23. *May 14, 1992*: The State moved the Ninth Circuit to reconsider the denial of the motion for expedited review.

24. *May 15, 1992*: Campbell's counsel and Campbell *pro se* each filed petitions for rehearing with suggestions for rehearing *en banc*.

25. *May 19, 1992*: The State moved for an expedited consideration of the petition for rehearing and to vacate the stay of execution.

26. *October 8, 1992*: The Ninth Circuit ordered the appeal of Campbell's second habeas petition to be reheard *en banc*.

27. *December 24, 1992*: The Ninth Circuit affirmed the district court's denial of Campbell's third habeas corpus petition as a successive petition and an abuse of the writ. *Campbell v. Blodgett*, 982 F.2d 1321 (9th Cir. 1992).

28. *January 20, 1993*: Reargument was heard by the Ninth Circuit *en banc* regarding Campbell's second habeas petition.

29. *January 26, 1993*: The Ninth Circuit granted Campbell an extension of time until January 31, 1993 to file a petition for rehearing regarding his third appeal.

30. *January 29, 1993*: The Ninth Circuit withdrew Campbell's second appeal from submission for twenty-one days and ordered each party to file a supplemental brief on the following issues: (1) did the district court err in not granting Campbell's request for an evidentiary hearing to determine whether hanging is cruel and unusual punishment; (2) is hanging cruel and unusual punishment; (3) was Campbell's application for writ of habeas corpus based upon issue 2 an abuse of the writ.

31. *April 28, 1993*: The Ninth Circuit *en banc* issued its order in Campbell's second appeal, remanding the case to the district court for an evidentiary hearing on the issue of whether hanging is cruel and unusual punishment under the Eighth Amendment.

32. *May 4, 1993*: The State filed an emergency motion in the Ninth Circuit to reconsider and vacate its order of remand.

33. *May 7, 1993*: A divided Ninth Circuit *en banc* panel denied the State's motion for reconsideration of the order of remand in a published, one sentence order. Judge O'Scannlain, joined by Judge Kleinfeld, dissented, concluding that:

> While the further delay to be caused by this remand order may not be egregious, it is symptomatic of this court's handling of this case. . . . Absent any indication by this court that the district court erred -- by holding that Campbell was denied a hearing on this issue

altogether or that the hearing given was somehow inadequate as a matter of law – I can see no basis to remand for a new evidentiary hearing.

See Appendix 2 at pp. 2-3.

IV. REASONS FOR GRANTING THE WRIT

A. Introduction

The Ninth Circuit's order should be summarily vacated because Campbell has already received an evidentiary hearing on that issue in 1989 and because the Ninth Circuit has failed to identify any error committed by the district court during that 1989 evidentiary hearing that would entitle Campbell to a remand. Rather, the *en banc* court merely concluded that it "would be assisted in [its] decision if [it] had the benefit of an evidentiary hearing." *See* Appendix 1.

This case, involving Campbell's appeal from the denial of his second federal habeas corpus petition, has now been pending in the Ninth Circuit for more than four years, with no sign of an ultimate resolution by that court in sight. More than a year ago, this Court found that the state of Washington had sustained severe prejudice as a result of the inordinate delays in Campbell's case, and concluded that any further delays in the Ninth Circuit's disposition of this matter would be subject to "a most rigorous scrutiny" in this Court if the State sought further relief. *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 676-77 (1992). Because an evidentiary hearing is unwarranted and will only exacerbate the severe prejudice the State has already

suffered, the State respectfully requests that this Court summarily vacate the Ninth Circuit's order of remand.

B. Legal Standard

Pursuant to 28 U.S.C. § 1651(a), this Court has jurisdiction to review, by extraordinary writ, an interlocutory order of the Court of Appeals. The present case is one of such imperative public importance that deviation from the normal process of review is justified. This Court has recognized the strong interest a state has in exercising its sovereign power to enforce its criminal laws. *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454 (1991). "Reexamination of state convictions on federal habeas 'frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* at 1469 (citations omitted). If the extensive delay in resolving *Campbell's* appeal continues, the state of Washington will suffer further harm.

The Supreme Court may issue writs of mandamus to inferior courts pursuant to 28 U.S.C. § 1651, the All Writs Act. *Marbury v. Madison*, 1 Cranch 137 (1803); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The authority of the Court to issue writs of mandamus extends to those cases that are within its appellate jurisdiction, although no appeal has yet been perfected. *Roche*, 319 U.S. at 25; *Dean Foods*, 384 U.S. at 603.

Mandamus is appropriate both to confine an inferior court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to

do so. *Roche*, 319 U.S. at 26; *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). This Court has held:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, ___ U.S. ___, 112 S. Ct. 674, 676 (1992). Mandamus should issue when a federal court fails in its duty to promptly decide a capital case.

The State respectfully requests this Court to issue an Extraordinary Writ of Certiorari, or, in the alternative, Prohibition or Mandamus, summarily vacating the April 28, 1993 order of the United States Court of Appeals for the Ninth Circuit.

C. Vacating the Ninth Circuit's Order Will Aid This Court in the Exercise of Its Appellate Jurisdiction

Until the Ninth Circuit renders a final decision in this case, this Court is deprived of the opportunity to exercise its power to review the Campbell case by writ of certiorari. The substance of Campbell's appeal lies unattended before the Ninth Circuit, offering neither party the opportunity for a final decision and final review by this Court. The Ninth Circuit's order granting an evidentiary hearing on a matter unrelated to Campbell's guilt or innocence adds to the delay and further hampers this Court's appellate jurisdiction. The circuit court is reframing the issues before it and attempting to remake the

record upon which it will decide those issues. However, since the Ninth Circuit has not yet ruled upon Campbell's claims, the State is deprived of the opportunity to seek review in this Court. If the Ninth Circuit had rendered a final decision holding that Campbell had been deprived of an evidentiary hearing and remanding for another, the State would have immediately sought certiorari review of that decision in this Court. By entering an interlocutory order of remand, the circuit court has attempted to insulate its order from review by this Court. Only summary vacation of the Ninth Circuit's order will allow this Court to exercise its review powers in a timely and meaningful fashion.

D. The State Will be Irreparably Injured if the Requested Relief is Not Granted

If this Court does not vacate the Ninth Circuit's order, the unnecessary delay resulting from another evidentiary hearing and the resulting further appellate review of the results of that hearing will cause the State irreparable harm. This Court recognized more than a year ago that "the State of Washington has sustained severe prejudice" by the stay of execution issued by the Ninth Circuit in the *Campbell* case, and that further delay would result in further harm. *In re Blodgett*, 112 S. Ct. at 676. If the order of remand is not summarily vacated, then the state of Washington will be further prevented from exercising its sovereign power to enforce its criminal law; an interest which this Court has held is to be given great weight. *In re Blodgett*, 112 S. Ct. at 676 (citing *McCleskey v. Zant*, 499 U.S. ___, 111 S. Ct. 1454 (1991)). This inability to exercise its sovereign power will result in irreparable harm to the State.

E. The State Has Demonstrated a Clear Legal Right to Relief

This Court has recognized the important issues involved in the *Campbell* case, and authorized the State to seek mandamus or other extraordinary relief by motion or petition if unnecessary delays continue in the disposition of this case. *In re Blodgett*, 112 S. Ct. at 677. The Ninth Circuit's interlocutory order of remand requiring an evidentiary hearing in this case is clear error and an abuse of discretion, indisputably entitling the State to relief. Despite the conclusory nature of Campbell's claim that hanging is unconstitutional, the district court afforded him a broad opportunity to present evidence on this and other claims during the 1989 evidentiary hearing. Campbell failed to present evidence at that hearing and has shown no excuse for this failure.

Campbell presented only a conclusory allegation in his second petition that hanging was *per se* cruel and unusual punishment. Raising a purely legal question, Campbell was not entitled to an evidentiary hearing on his claim in 1989. Because hanging, a traditional method of execution, is presumptively constitutional, Campbell failed to make out either a factual or legal entitlement to relief in his second petition.

Despite the unmistakable directive from this Court, in *In re Blodgett*, 112 S. Ct. at 676, to "take all steps necessary to ensure a prompt resolution of [this] matter," Campbell's second petition has now entered its fifth year of review before the circuit court. Without any indication that the district court erred during the 1989 evidentiary hearing, the Ninth Circuit has ignored the Constitution's directive to decide the case presented by the

parties, and instead has remanded for another evidentiary hearing because it believes the record can be made better given a second opportunity.

1. Legal Standard For Stay of Execution And Evidentiary Hearing

In order to be entitled to a stay of execution, the burden is on the federal habeas petitioner to demonstrate that there are "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Federal courts have the authority to expedite consideration of federal habeas petitions and requests for stays of execution, particularly in cases involving second or successive habeas petitions. *Barefoot*, 463 U.S. at 895; *In re Blodgett*, 112 S. Ct. at 676. It is an abuse of discretion for a district court to stay an execution pending the disposition of a second or successive petition if the petitioner fails to present substantial grounds upon which relief might be granted. *Delo v. Stokes*, 495 U.S. 320 (1990).

An evidentiary hearing is mandatory in a federal habeas proceeding only if the petitioner "alleges facts which, if proved, would entitle him to relief." *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (emphasis added). In other words, the district court must be presented with allegations of material fact before the petitioner is entitled to a plenary federal evidentiary hearing. *Townsend*, 372 U.S. at 313. Conversely, no evidentiary hearing is required if the claim presents a purely legal question or if the evidence proffered by the petitioner is "tentative and fragmentary" or conclusory. *Maggio v. Williams*, 464 U.S. 46, 50 (1983); *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977);

Advisory Committee Note to Rule 4, Rules Governing § 2254 Cases. Moreover, the petitioner must have previously afforded the state courts a full and fair opportunity to address the merits of his claim, a requirement that is not met by the mere statement of a federal claim in state court. *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S. Ct. 1715, 1720 (1992).

2. Although He was Not Entitled to an Evidentiary Hearing, the District Court Exercised Its Discretion and Granted Campbell a Full and Fair Evidentiary Hearing

This Court concluded that the district court "acted with commendable dispatch" in conducting an evidentiary hearing on Campbell's second petition and rendering a prompt decision. *Blodgett*, 112 S. Ct. at 675. The record is clear that Campbell was given the opportunity to present whatever evidence he wanted to present in support of his claims, including his three hanging claims. The district court did not deny or "fail to grant" him an evidentiary hearing. Instead, Campbell and his attorneys made a strategic decision to concentrate their efforts on his waiver and ineffectiveness claims, presenting testimony and declaratory evidence in support of those claims. The district court did not limit Campbell in any way, and instead, allowed him to present any evidence he wanted in support of his claims. That Campbell may have chosen to focus on claims he felt were more important, i.e., claims that would entitle him to a new

trial, does not mean that he was denied an opportunity to present evidence on the issue of hanging.[8]

Ultimately, any challenge to the district court's 1989 evidentiary hearing is really a challenge to the denial of Campbell's motion for a stay of execution. Throughout the 1989 proceedings, Campbell and his attorneys complained of being "forced" or "compelled" to conduct an evidentiary hearing and requested that the district court stay the execution so that they could have more time to prepare for their presentation. Neither Campbell nor his attorneys made an offer of proof regarding any evidence they would present on the hanging issues if the evidentiary hearing were postponed.[9] Indeed, one of Campbell's own witnesses testified that Campbell's attorneys would first have to research Claims 5.17 and 5.18 to decide whether they were even legitimate claims to raise on federal habeas and then to determine whether the claims had any factual basis. Campbell was not entitled to an indefinite stay of execution based upon his self-serving assurance that he would then somehow be able to determine whether his claims had any

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[8]Indeed, Campbell's Claim 5.18 (alleging that Campbell is terrified of hanging and that selecting lethal injection would violate his religious principles) would appear to require, at a minimum, Campbell's testimony to explain and make more specific an otherwise unsupported and conclusory allegation. However, Campbell was present throughout the March 27, 1989 evidentiary hearing and could have testified, but, for reasons unknown to the State, chose not to testify.

[9]It should be noted that, in any event, no court has ever found hanging to be cruel and unusual punishment. IV(E)(4), *infra*.

factual basis or legal merit.[10] This Court has observed that the procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error. *Barefoot v. Estelle*, 463 U.S. at 887-88.[11] Moreover, Campbell was not entitled to an evidentiary hearing based upon his bare allegations, though the district court did not deny Campbell the opportunity to present whatever evidence he wished to present concerning Claims 5.16, 5.17 and 5.18. Campbell received a full and fair evidentiary hearing on his hanging claims, and his strategic decision to pursue other claims does not change that fact.

3. Campbell Was Not Entitled to an Evidentiary Hearing

Campbell was not entitled to an evidentiary hearing on his unsupported allegations concerning hanging because he did not allege facts which, if proven, would entitle him to relief. As an initial matter, Campbell's first challenge to hanging

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[10]As the three-judge panel correctly observed, Campbell had well over three years – from July 1985 (the issuance of the first federal court stay of execution) until March 1989 – in which to litigate any claims he sought to raise in his second state personal restraint petition. *See Campbell*, 978 F.2d at 1516-17. Thus, any contention that Campbell had inadequate opportunity to prepare and present his habeas claims to the district court in 1989 is grossly inaccurate. The "emergency" situation Campbell confronted in 1989 was an emergency of Campbell's own making.

[11]Granting Campbell a continuance in connection with his evidentiary hearing would necessarily have required granting him a stay of execution. Therefore, the district court's scheduling of Campbell's evidentiary hearing must be viewed under the *Barefoot* standard.

(Claim 5.16) raised a legal question only, alleging that hanging was cruel and unusual punishment *per se*. No evidentiary hearing is necessary to resolve such a purely legal question.[12]

With respect to Campbell's two other challenges to hanging (lack of a qualified hangman and the choice between hanging and lethal injection), Campbell's claims were not supported by any evidence at all. Campbell produced affidavits and testimony concerning his absence from jury selection and his ineffective assistance claims. The district court also had before it the transcript of the state court proceedings during which Campbell waived his presence at jury selection. Thus, Campbell arguably alleged facts on his waiver and ineffectiveness claims sufficient to warrant further inquiry. In contrast, Campbell alleged no facts regarding his hanging claims that would have entitled him to an evidentiary hearing. His Claims 5.16, 5.17, and 5.18 were conclusory, lacking in specifics, and unsupported by any declaratory or other evidence. Campbell's bare allegations did not give rise to a genuine dispute of material fact and, therefore, did not warrant an evidentiary hearing.

4. It Is Clear Error for the Ninth Circuit to Continue a Stay of Execution and Provide Campbell a Second Chance for an Evidentiary Hearing on Hanging Where the Factual and Legal Basis for Campbell's Claims are Plainly Lacking

The Ninth Circuit's error in providing Campbell a second chance to present evidence on the issue of hanging is

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[12]Campbell's own witnesses testified that Claim 5.16 was a matter of law only.

even more stark when viewed in light of Campbell's burden. Hanging is a traditional method of execution that does not involve anything more than the infliction of pain necessarily associated with the humane extinguishment of human life and is presumptively constitutional.

This Court has declared that:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. . . . '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' . . . The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'

Gregg v. Georgia, 428 U.S. 153, 174-76 (1976) (emphasis added). Thus, the courts play a limited role in testing the validity of a statutorily imposed punishment and may not act as legislators. *Gregg*, 428 U.S. 153, 174-76 (1976); *see also State v. Rupe*. 101 Wn.2d 664, 698, 683 P.2d 571 (1984).

A court may not disturb the legislature's choice of a method of punishment under the authority of the Eighth Amendment unless the punishment involves torture, lingering death, or the unnecessary and wanton infliction of pain. *Gregg*, 428 U.S. at 171-74; *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). "The cruelty against

which the Constitution protects a convicted man is . . . not the necessary suffering involved in any method employed to extinguish life humanely." *Louisiana v. Resweber*, 329 U.S. 459, 464 (1947). The Eighth Amendment requires that "[t]he punishment must not involve the unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 173.

Campbell cannot assert that hanging was considered cruel and unusual at the time the Bill of Rights was adopted.[13] Campbell's arguments may succeed only if hanging is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). However, traditional methods of execution are entitled to a presumption of constitutionality. The *Trop* Court held that only "technique[s] outside the bounds of . . . traditional penalties [are] constitutionally suspect." *Trop*, 356 U.S. at 100.

In discerning whether a punishment is cruel and unusual, a court must not make a subjective assessment of the modern standards of decency, but must instead "look to the objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173.[14] The most reliable objective evidence of contemporary values are the pronouncements of the states' legislatures. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

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[13]Prior to the 1900's, hanging was the universally accepted form of execution in this country. *State v. Frampton*, 95 Wn.2d 469, 492, 627 P.2d 922 (1981).

[14]This Court has made it clear that "it is *American* conceptions of decency that are dispositive." *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 2975 n. 1, 106 L. Ed. 2d 306 (1989) (emphasis in the original). The sentencing practices of other countries are irrelevant in determining whether a punishment is cruel and unusual. *Id.*

A method of punishment does not violate the constitutional prohibition against cruel and unusual punishment merely because the punishment involves the infliction of some pain. The Eighth Amendment prohibits only barbarous and torturous methods of punishment, and those punishments which involve the "unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 171-74. As Justice Scalia recently noted: "[t]the prohibitions of cruel and unusual punishments . . . would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for gratification of fiendish passion." *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680, 2694 (1991). However, this Court has also held that the Legislature is not required "to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane. . . ." *Gregg*, 428 U.S. at 175.

Campbell did not offer one shred of evidence or factual support in either his second petition or at the 1989 evidentiary hearing to suggest that hanging involves lingering death or the infliction of pain beyond that necessary for the humane extinguishment of life. He offered no experts, no anecdotal reports, no factual history of death by hanging to support his assertion. Campbell presented not even the barest of evidence that hanging was the equivalent "of the rack or the stake, . . . horrid modes of torture, devised by human ingenuity for gratification of fiendish passion." Campbell failed in this regard because hanging is a presumptively constitutional, traditional method of execution that has been in use in this country for well over a hundred years.

Moreover, every court, including the Washington Supreme Court, that has considered hanging as a method of execution, has found it constitutional. Thus, Campbell's assertion was as lacking in legal foundation as it was devoid of factual support.

The Washington Supreme Court held that hanging is not the type of punishment proscribed by the Washington and United States Constitutions. *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). The *Frampton* Court held that the Legislature is better equipped to determine which method of execution is most appropriate for the State of Washington. *Frampton*, 95 Wn.2d at 512-514, and 527 (Brachtenbach, C.J. and Rosellini, Dore, Stafford, Hicks and Dimmick, JJ., finding hanging is not cruel and unusual punishment).

In *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989), the court unanimously declined to find hanging unconstitutional, thereby reaffirming its decision in *Frampton* that hanging does not constitute cruel and unusual punishment. *Campbell*, 112 Wn.2d at 192.

Other courts have held that hanging comports with the Eighth Amendment. *See Deshields v. State*, 534 A.2d 630 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988) (hanging is not cruel and unusual punishment); *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979), *cert. denied*, 446 U.S. 970 (1980) (hanging is not cruel and unusual punishment); *McKenzie v. Osborne*, 195 Mont. 26, 51, 640 P.2d 368 (1981) (relying upon *Coleman* to deny petitioner's claim that hanging is cruel punishment); *Fitzpatrick v. State*, 638 P.2d 1002, 1011 (Mont. 1981) (deferring to the Legislature in selecting the method of

execution); *State v. Kilpatrick*, 201 Kan. 6, 439 P.2d 99 (1968) (Legislature has the sole authority to determine the method of execution, and the court would not disturb the Legislature's decision absent clear evidence that hanging is actually cruel and unusual punishment).[15]

While the federal courts have never addressed the issue of whether judicial hanging constitutes a cruel and unusual method of punishment, the courts have determined that other traditional methods of execution are constitutional. In every case, the courts have found that these traditional, legislatively prescribed methods of execution are constitutional. *See Louisiana v. Resweber*, 329 U.S. 459 (1947) (death by electrocution is not cruel punishment); *Wilkerson v. Utah*, 99, U.S. 130, 136 (1879) (death by firing squad is not cruel punishment); *Andrews v. Shulsen*, 802 F. 2d 1256 (10th Cir. 1986) (claim that death by firing squad violates the Eighth Amendment is without merit), *cert. denied*, 485 U.S. 919 (1988); *Johnson v. Kemp*, 759 F. 2d 1503 (11th Cir. 1985) ("contention that death by electrocution violates the Eighth Amendment is frivolous"); *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985) (claim that death by electrocution is cruel and unusual punishment is without merit), *cert. denied*, 476 U.S. 1153 (1986); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983)

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[15]Two other states have also held hanging to be a constitutionally permissible method of execution. The Oregon Supreme Court determined that hanging is not cruel and unusual punishment. *State v. Butchek*, 121 Ore. 141, 253 P. 367, 370 (Ore. 1927). Similarly, the Iowa Supreme Court held that hanging does not violate the Constitution because it is not torture or mutilation nor does it "shock the mind of every [person] possessed of common feeling. . . ." *State v. Burris*, 194 Iowa 628, 190 N.W. 38, 42 (1922).

(electrocution is a constitutional method of execution); *see also Thomas v. Jones*, 742 F. Supp. 598, 607 (S.D. Ala. 1990) (rejecting Eighth Amendment challenge to execution in Alabama's electric chair); *Godfrey v. Francis*, 613 F. Sup. 747, 764 (D. Ga. 1985) (rejecting Eighth Amendment challenge to electrocution), *aff'd*, 836 F.2d 1557 (11th Cir. 1988) (*en banc*), *cert. dismissed*, 487 U.S. 1264 (1988).

Campbell has failed in state and federal court to make any showing that the presumptively constitutional and traditional execution method of hanging will involve more than the infliction of pain necessarily associated with the humane extinguishment of life. Now, despite the dearth of factual or legal support for Campbell's bare assertion that hanging violates the Eighth Amendment and despite the fact he was provided the opportunity to attack this method of execution in 1989, Campbell has convinced the Ninth Circuit to reopen the door for further delay and re-examination of this claim. Again, the State is faced with a severe compromise of its interest in finalizing the criminal judgment in Campbell's case, while the Ninth Circuit offers neither plausible explanation nor rationale for allowing Campbell a renewed chance to "get it right."

V. CONCLUSION

For the reasons stated above, the State respectfully prays that this Court grant its petition for Extraordinary Writ of Certiorari, or in the Alternative, Prohibition or Mandamus, to

the United States Court of Appeals for the Ninth Circuit, and summarily vacate that court's of remand.

DATED this 17th day of May, 1993.

Respectfully submitted,

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APPENDIX 1

[FILED]
[April 28, 1993]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35210
DC NO. CV-89-456-C

ORDER

CHARLES CAMPBELL,

Petitioner-Appellant,

-vs-

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Before: WALLACE, Chief Judge, BROWNING, TANG, POOLE, D.W. NELSON, REINHARDT, BEEZER, WIGGINS, THOMPSON, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

The *en banc* court has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment. We would be assisted in our decision if we had the benefit of an evidentiary hearing, with findings and conclusions

by the district court. Therefore, we remand the case for thirty-five (35) days for that purpose. The district court should advise us if additional time is needed.

The evidentiary hearing should be limited to the hanging issue under the Eighth Amendment; it should not extend to the issue of whether the choice between hanging and lethal injection is a constitutional violation.

This *en banc* court retains jurisdiction.

Judges O'Scannlain and Kleinfeld dissent from this order.

APPENDIX 2

[FILED]
[May 7, 1993]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35210
DC NO. CV-89-456-C

ORDER

CHARLES CAMPBELL,

Petitioner-Appellant,

-vs-

JAMES BLODGETT, Superintendent, Washington State Penitentiary Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Filed: May 7, 1993

Before: WALLACE, Chief Judge, BROWNING, TANG, POOLE, D.W. NELSON, REINHARDT, BEEZER, WIGGINS, THOMPSON, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

A majority of the *en banc* court has voted to deny respondents-appellees' motion for reconsideration of order of remand.

COUNSEL

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Paul D. Weisser, Assistant Attorney General, and John M. Jones, Assistant Attorney General, Olympia, Washington, for respondents-appellees.

Campbell v. Blodgett, No. 89-35210

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins, dissenting:

A majority of the *en banc* court "has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment" and has concluded that it "would be assisted . . . if it had the benefit of an evidentiary hearing." The majority, however, has failed to identify any error committed by the district court that would entitle Campbell to a remand. I dissented from the order of remand and would now grant the state's well-taken motion for reconsideration. I cannot agree that an appellate court should frame issues not before it or determine how the record is made.

In our system of justice, an appellate court decides issues properly presented to it by the parties on the record they made before the trial court. When a party has had the opportunity for a full and fair evidentiary hearing, we are bound by the record the party has chosen to make. In this, Campbell's second federal habeas petition, an evidentiary hearing *was* held by the district court on March 27, 1989. At that time, the district court indicated that it would hear *any* evidence Campbell chose to offer. Campbell offered evidence regarding his waiver of the right to be present during voir dire and the ineffective assistance of counsel; he chose to make only the barest of allegations concerning the constitutionality of hanging.

Over ten years have elapsed since Campbell was sentenced to death on December 17, 1982. He filed his first federal habeas petition in 1985, which was eventually denied by this court in 1987. *See Campbell v. Kincheloe*, 829 F.2d 1453

(9th Cir. 1987) (rejecting the contention that Washington's capital punishment statute is unconstitutional), *cert. denied*, 488 U.S. 948 (1988). The claim he raises, that hanging is unconstitutional, is both obvious and fundamental and was indeed raised in earlier state proceedings. Thus, while I recognize that the evidentiary hearing was held on short notice, I simply cannot accept Campbell's contention that he was not given adequate time to present this claim when he filed this new petition in 1989. Presentation of claims seriatim, saving some for many years until just before the scheduled execution, if indulged, thwarts reasoned resolution.

Campbell had the strongest of incentives to pursue all of his claims fully, yet he chose to focus on claims other than the constitutionality of hanging. He has not shown cause for failing to present evidence concerning this issue despite the clear opportunity to do so. For these reasons, I would decide this appeal on the record presently before us. Indeed, the Constitution binds us to decide only the case presented to us, not other issues that may interest us. It is no more legitimate for us to choose to reach issues not properly pursued by a litigant than it is for us to remand for an evidentiary hearing because we believe the record can be made better given a second opportunity.

Over a year ago, the Supreme Court reminded us that the State of Washington has sustained "severe prejudice" by the stay of execution in this case, which is now over four years old. *In re Blodgett*, 112 S. Ct. 674, 676 (1992). While the further delay to be caused by this remand order may not be egregious, it is symptomatic of this court's handling of this case. The Supreme

Court has definitively ruled that the death penalty itself is not unconstitutional. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976). R.C.W. § 10.95 is the duly enacted law of the State of Washington. The people of Washington have a legitimate interest in seeing their criminal statutes carried out in a timely manner. *See Blodgett*, 112 S. Ct. at 676. Absent any indication by this court that the district court erred--by holding that Campbell was denied a hearing on this issue altogether or that the hearing given was somehow inadequate as a matter of law--I can see no basis to remand for a new evidentiary hearing.

I respectfully dissent.

Supreme Court, U.S.
FILED
MAY 25 1993
OFFICE OF THE CLERK

NO. 92-1837

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT,
Superintendent, Washington
State Penitentiary,

Petitioner,

v.

CHARLES CAMPBELL,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NO. 92-1837

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT,
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v.

CHARLES CAMPBELL,

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RESPONDENT'S OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

Respondent Charles Campbell respectfully asks that petitioner's Petition for an extraordinary writ be denied for the following reasons:

First, petitioner has misrepresented the facts to this Court. Charles Campbell has never been given an opportunity to present evidence regarding his claim that hanging is cruel and unusual punishment.

Second, petitioner Blodgett is responsible for the fact that Campbell has never received an evidentiary hearing on his hanging claims. Blodgett originally argued that Campbell was not entitled to an evidentiary hearing because his claim regarding hanging was not justiciable. After the en banc panel of the Ninth Circuit rejected Blodgett's nonjusticiability argument, Blodgett changed his argument and began to argue that Campbell had already had an opportunity for an evidentiary hearing on his hanging claims.

Third, petitioner Blodgett seeks to blame the en banc panel of the Ninth Circuit for delays caused earlier by the three judge panel, and fails to note that the en banc panel has acted with considerable speed and dispatch in processing this case. Petitioner Blodgett ignores the fact that the remand order for an evidentiary hearing has been expressly limited to a period of 35 days which expires on June 2nd. The Honorable John C.Coughenour, the District Court Judge presiding at the hearing, has has advised the parties that, consistent with the 35 day time limit established by the en banc panel, he will issue his Order on or before

June 2, 1993. There simply is no issue of protracted delay.

Fourth, petitioner Blodgett has failed to apprise this Court of the fact that in preparation for the upcoming evidentiary hearing, the use of discovery procedures was authorized by the District Court; ten expert witnesses were retained by the parties; depositions have occurred of these ten witnesses; requests for production and interrogatories have been served and responses have been received; and, by the time this Court confers on the Petition, the hearing will have concluded. [1/]

Fifth, petitioner Blodgett has failed to explain how the State of Washington would suffer

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[1/] At the time of the filing of this Response, two of the three days set aside by the District Court for the hearing will have concluded. In that time the District Court has already taken the testimony of four witnesses for Petitioner, including experts from New Mexico and Vancouver, British Columbia. It has also heard the testimony of Dr. Deryk James, an expert forensic pathologist at the Wales Institute of Forensic Medicine in the United Kingdom, who testified for Respondent. The Court has also received into evidence the deposition testimony of Dr. William Longstreth, the Chief of Neurology at Harborview Medical Center in Seattle, Washington, and Dr. Daniel Graney, a Professor of Anatomy at the University of Washington. Additional experts will testify in the final day of the hearing tomorrow. The Court has also received into evidence several hundred pages of ancient documents. Judge Coughenour has informed the parties that he has read all of the depositions and documentary evidence that has been admitted.

any appreciable injury at all, (much less any "irreparable" injury) by allowing the May 24-26th evidentiary hearing to take place and permitting the lower courts to consider the evidence adduced at the hearing. The only conceivable injury the State might suffer is that respondent Campbell will have presented compelling medical testimony that hanging presents serious risks of a slow, torturous, lingering and painful death by means of suffocation, as well as a substantial risk of decapitation and other forms of bodily mutilation. The conclusion is inescapable that petitioner Blodgett is seeking vacation of the order of remand primarily because petitioner knows that convincing evidence was brought out during discovery and presented by Campbell at the hearing to establish that the punishment of death by hanging is cruel and unusual.

Sixth, petitioner Blodgett admits that no federal court has ever addressed the merits of a claim that hanging is cruel and unusual, and yet makes the specious suggestion that since claims regarding electrocution have been rejected, there is no need to hold a hearing on Campbell's claim regarding hanging. Blodgett ignores the fact that

there are only two states left that execute by hanging.

II.

THE EN BANC COURT HAS ACTED WITH CONSIDERABLE SPEED AND HAS PUT TIGHT TIME LIMITS ON ITS REMAND ORDER.

By failing to distinguish between the three judge panel which delayed taking any action for two and a half years after oral argument, and the en banc panel which has taken swift action since en banc review was granted, petitioner Blodgett misleadingly suggests that "the Ninth Circuit" is failing to follow the direction of this Court to ensure a prompt resolution of this case.

In In re Blodgett, ___ U.S. ___, 116 L.Ed.2d 669, 112 S.Ct. 674 (1992), this Court noted that the three judge panel heard oral argument in June of 1989 and yet took no action for a period of more than two years. Two years and four months after oral argument to the three judge panel, the Washington Attorney General filed a petition for a writ of mandamus in this Court. On January 13, 1992 this Court denied the writ, but nonetheless made it clear that in a capital case the grant of a stay of execution imposes upon a federal court the duty to

"take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case." Blodgett, 116 L.Ed.2d at 674-75.

Since the issuance of that decision all of the judges of the Ninth Circuit have taken that directive to heart, and have acted swiftly. For example, the three judge panel responded by issuing its decision within 2-1/2 months of this Court's per curiam opinion. The three judge panel affirmed the District Court's denial of the habeas petition on April 1, 1992. Campbell v. Kinchloe, 978 F.2d 1502 (9th Cir. 1991).

After Campbell filed a petition for rehearing en banc, the judges of the Ninth Circuit granted rehearing en banc and the case was then placed on an expedited schedule. Oral argument was held within 3 months of the granting of rehearing en banc. Significantly, when Campbell moved to discharge his appointed counsel Steven Berman and to substitute new counsel (James E. Lobsenz) the en banc panel granted the motion only on the condition that Campbell and his new counsel stipulate that there would not be any motion to continue the oral

argument date. (See copy of Order of January 14, 1993, attached as Appendix A).

Nine days after the en banc oral argument, the Court directed the parties to file supplemental briefs addressing the issue whether hanging was cruel and unusual punishment, and various procedural issues such as whether Campbell had exhausted this issue by presenting it to the state courts, and whether any court had provided him with an evidentiary hearing on his hanging claims. The en banc panel gave the parties 21 days (until February 19th) to file their supplemental briefs. Two months and one week after the filing of the supplemental briefs, the en banc panel issued its remand order directing the District Court to hold an evidentiary hearing within 35 days and retaining jurisdiction over the case.

Petitioner's argument that this Court's jurisdiction is being frustrated by the actions of the Ninth Circuit subsequent to the order in In re Blodgett is itself extraordinary. To believe the state's argument is to believe that a majority of the judges in active service in the United States Court of Appeals for the Ninth Circuit has conspired together to grant en banc review in this

case merely to delay an inevitable execution and deprive this Court of jurisdiction. This extraordinary charge is clearly not true. En banc review of Mr. Campbell's habeas corpus petition was granted because the petition raised questions of exceptional importance, Fed. R. App. P. 35(a)(2), and questions about which consideration by an en banc panel was necessary to maintain uniformity of the court's decisions. Fed. R. App. P. 35(a)(1). Since en banc review was granted the en banc panel has acted expeditiously and fairly.

The interruption in the en banc panel's consideration occasioned by its remand order was only 35 days. Most of that time had already elapsed before petitioner took any action in this Court. Probably all of it will have elapsed before this Court is able to rule on the petition. The suspension of the en banc panel's consideration of Mr. Campbell's case has been minimal and has not "irreparably harm[ed]" the State. If the State of Washington is ultimately successful in obtaining a ruling that hanging is not cruel and unusual punishment, then the State will not have been harmed at all. On the contrary, the State will have benefitted by having obtained a ruling which re-

solves the issue. Since several other death row inmates in Washington are raising the same issue, the State of Washington will have to face the fact that an evidentiary hearing on hanging is going to take place soon, if not in Campbell's case, then in the case of another death row prisoner.

Petitioner's fear that the state will be irreparably harmed by the pace of the en banc panel's consideration of the record of the hearing is also exaggerated, speculative, and unfounded. The en banc panel has acted with dispatch since en banc review was granted. It imposed an expedited hearing schedule in its remand order which has been strictly adhered to by the parties and the District Court. There is no reason to believe that the en banc panel will not hold itself to the same rigorous standard of expedition in reviewing the evidence adduced at the hearing that it imposed upon the parties and District Court in conducting the hearing. Moreover, if the state is concerned about the possibility of delay in the en banc panel's consideration of the hearing record it must ask that panel for expedited review before seeking an extraordinary writ from this Court. Sup. Ct. R. 20.1.

Instead, petitioner seeks to have this Court take extraordinary action against the en banc panel -- which has "acted with commendable dispatch," In re Blodgett, ___ U.S. ___, 112 S.Ct. 674, 675 (1992), -- because of delay that occurred before en banc review was granted and for which the en banc panel is not responsible. The extraordinary action petitioner Blodgett has asked this Court to take is ill-advised, not only because the litigation before the en banc panel of the Ninth Circuit has moved in an orderly and expeditious way and, therefore, issuance of an extraordinary writ is unnecessary, but also because of what the issuance of such a writ may portend on a systemic level. In essence, petitioner asks this court to police the calendar management of a lower court. A resolution of this petition in favor of petitioner will encourage any litigant who is unhappy with the pace of litigation in the lower courts to seek an extraordinary writ from this Court. It is not only in death penalty cases that the doors of this Court's extraordinary writ jurisdiction may be perceived as having been opened wide. There are a myriad of circumstances in which litigants routinely perceive that delay in the decisionmaking of a lower court causes them

ongoing harm. For instance, litigants seeking injunctive relief must demonstrate that in the absence of such relief he or she will suffer irreparable injury. Doran v. Salem Inn, Inc., 422 U.S. 922, 935 (1975). Whether such an injunction is granted or withheld, one or the other of the parties to the litigation frequently will perceive that they suffer continuing harm while the case is under consideration by the lower courts. See generally, e.g., New York State National Organization for Women v. Terry, 886 F.2d 1339 (1989), cert. denied, 495 U.S. 947 (1990) (Upholding injunction prohibiting anti-abortion protestors from blocking access to abortion facilities. Protestors alleged injunction interfered with the exercise of their First Amendment rights); K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907 (1st Cir. 1989) (Shopping center tenant obtained injunctive relief against landlord to stop ongoing construction near tenant's premises that breached long-term lease and interfered with tenant's business. Injunction stayed during appeal, throughout which landlord could not complete construction project and tenant continued to have his premises interfered with); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir.

1981), cert. denied, 455 U.S. 942 (1982) (Granting injunctive relief to jail detainee alleging that Detention Center's strip search policy violated Fourth Amendment. District Court's denial of injunction permitted policy to remain in effect during pendency of appeal). The priority given these cases by the lower courts is a significant problem of system management in a court system that is "seriously overburdened." Carden v. Arkoma Associates, 494 U.S. 185, 207 (1990) (O'Connor, J., dissenting).

The Chief Justice has likened the federal court system to "a city in the arid West which is using every bit of its water resources to supply current needs." Rehnquist: Federal Courts Under Strain, Minneapolis Star Tribune, Jan. 1, 1992, at A17. It makes little sense for this Court to become the repository for consumer complaints that are the inevitable byproduct of resource rationing. Micromanagement of the lower courts' dockets -- or even the prospect that litigants will perceive that they are invited to seek this Court's intervention whenever they believe that the lower courts should move faster -- is more likely to exacerbate a systemic problem than alleviate it.

The power to grant an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651, "is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . .." LaBuy v. Howes Leather Co., 352 U.S. 249, 257 (1957), quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). The en banc panel's remand order was issued to provide that panel with the tools to undertake an informed review of the constitutional question pending before it. Far from evincing a "usurpation of judicial power," an appellate court's judgment about whether it has a sufficiently developed factual record on which to base its decision, and how much study to give to the issues before it, are at the very core of the judicial function. Appellate judges have the daily responsibility of deciding how to allocate their limited resources to an ever-expanding press of business and still insure that their decisions are fully informed and made with deliberation and care. They are in the best position to decide what information is necessary for them to come to a reasoned and measured judgment. To obtain an extraordinary writ, the petitioner bears "the burden of showing that its right

to issuance of the writ is 'clear and indisputable.'" Bankers Life & Casualty Co., 346 U.S. at 384, quoting United States v. Duell, 172 U.S. 576, 582 (1899). The orderliness of the federal judiciary, and the respect that is due the Circuit judges charged with the responsible administration of their dockets, demands far more justification for extraordinary intervention by this Court than has been offered by the state.

In sum, there is no basis for petitioner Blodgett's attempt to equate the 2-1/2 years of post-oral argument inaction by the three judge panel, with the three month period which has elapsed since the en banc panel heard oral argument on January 20, 1993. Moreover, the 35 day time limit on the remand, (which expires on June 2nd) demonstrates that the en banc panel is determined to keep this case moving along expeditiously and there is not adequate justification for interfering with that panel's deliberations.

III.

BLODGETT FIRST ARGUED THAT CAMPBELL WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER HANGING IS CRUEL AND UNUSUAL, BECAUSE THE ISSUE WAS NONJUSTICIABLE. BLODGETT

SUCCEEDED IN CONVINCING THE DISTRICT COURT AND THE THREE JUDGE PANEL THAT THIS NONJUSTICIABILTY ARGUMENT WAS CORRECT. NOW THAT THE EN BANC PANEL HAS REJECTED THAT ARGUMENT, BLODGETT CANNOT CHANGE HIS POSITION AND ARGUE, FOUR YEARS LATER, THAT CAMPBELL ACTUALLY HAD THE OPPORTUNITY FOR AN EVIDENTIARY HEARING ON THE HANGING ISSUE.

Petitioner Blodgett repeatedly argued that Campbell's challenge to the constitutionality of hanging is nonjusticiable because the applicable statute, Wash. Rev. Code § 10.95.180, permits a prisoner sentenced to death to escape hanging by electing lethal injection as the means of execution. The District Court apparently agreed with this argument, when it concluded that Campbell's hanging claims "did not raise a substantial showing of the violation of a federal right." The three judge panel explicitly agreed with this argument when it held, "We find the issue nonjusticiable . . . because Campbell may choose between hanging and lethal injection, and thereby avoid his constitutional objection." Campbell v. Blodgett, 978 F.2d 1502, 1518 (9th Cir. 1991).[2/]

[2/] It is noteworthy that one of the judges who sat on the three judge panel, Judge Poole, has apparently changed his mind on the justiciability (continued...)

Following the panel decision, the State continued to argue in favor of nonjusticiability. In its brief in opposition to rehearing en banc, petitioner Blodgett argued as follows:

> This Court's conclusion that Campbell's Eighth Amendment challenge to hanging is nonjusticiable is correct. Because RCW 10.95.180 gives Campbell the ability to choose lethal injection and to avoid hanging, Campbell does not need judicial intervention to redress his constitutional objection to hanging. This Court has properly declined to decide an issue that Campbell himself has manufactured.

Appellee's Answer to Petition for Rehearing and Rehearing En Banc, p. 8.

The nonjusticiability argument is plainly without merit. The ability of a convicted defendant to choose a constitutionally permissible sentence does not insulate from judicial review another alternative sentence confronting the defendant. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (en banc); United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981). Moreover, there are other contexts in which

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[2/](...continued)
issue, since he joined in the order of remand signed by Chief Judge Wallace on behalf of nine members of the en banc panel. Only Judges O'Scannlain and Kleinfeldt dissented from the order.

this Court has determined that the existence of a constitutional alternative does not render a challenge to the constitutionality of another alternative nonjusticiable. For instance, in Oklahoma v. United States Civil Service Com., 330 U.S. 127 (1947), the Court held that the constitutionality of requiring a state agency that received federal funds to compel employees to refrain from certain political activities was a justiciable question even though the agency could elect not to take the federal funding. Id. at 136-37. See also, Rust v. Sullivan, 500 U.S. ___, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (ruling on first and fifth amendment challenges to regulations prohibiting agencies which choose to accept Title X funding from engaging in certain abortion-related activities); South Dakota v. Dole, 483 U.S. 203 (1987) (deciding the constitutionality of withholding a percentage of federal highway funds from state that elect to keep their drinking age under 21).

Whether an offensive form of punishment may be carried out by a state cannot be made to depend on the whim of a death-sentenced inmate. If, for example, the State of Washington allowed crucifixion and lethal injection as alternative methods of

capital punishment, the existence of lethal injection as an option would not foreclose judicial review of the constitutionality of crucifixion. The question would be justiciable because an inmate could elect to have the state put him to death by a means that offends contemporary standards of decency. See generally Trop v. Dulles, 356 U.S. 86, 101 (1958). The question of the constitutionality of hanging under Washington law is no different, as the en banc panel of the Ninth Circuit has apparently concluded.[3/] Indeed, the justiciability and importance of the question before the en banc panel were made starkly apparent in early January, 1993, when a Washington death-row inmate, Westley Allan Dodd, was executed by hanging.[4/]

The State of Washington previously argued that Campbell was properly denied an evidentiary hearing

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[3/] Although the text of the April 28, 1993 order issued by the en banc panel does not explicitly state that it has rejected the nonjusticiability argument, that can certainly be implied. For if the en banc panel actually believed the issue was nonjusticiable, there would be no reason to remand the case for an evidentiary hearing on the hanging issues.

[4/] The expert forensic pathologist who performed the autopsy on Mr. Dodd's body will testify at the evidentiary hearing in the District Court about the highly unusual nature of the internal injuries that caused Mr. Dodd's death.

because the issue was nonjusticiable. Having failed to persuade the en banc panel that the issue is nonjusticiable, the State now pretends that it never argued nonjusticiability, that Campbell actually did have an opportunity to present evidence in support of his hanging claims, and that Campbell's previous attorneys inexplicably declined to present any evidence in support of those claims.

Petitioner cannot deny his own responsibility and role in the events that led the District Court to deny Campbell any evidentiary hearing on his hanging claims. The State cannot argue in 1989 that the issue is nonjusticiable and therefore not deserving of an evidentiary hearing, and then argue four years later that it was justiciable all along and that Campbell could have presented evidence in support of these claims had he wished to.[5/]

[5/] This is not the first time the attorneys representing the petitioner in this case have misled a court by taking polar opposite positions in different courts in the same case. In Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2915 (1991), Judge Trott wrote for the Court that the state prevailed in the state court "by telling the state court the opposite of what it told the federal court." Id. at 1038. Condemning the state's tactics the Court took the extraordinary measure of employing the rule of judicial estoppel to "protect its dignity and it[s] system of justice." Id.

IV.

CAMPBELL HAS NEVER HAD AN EVIDENTIARY HEARING ON THE HANGING ISSUE, AND WAS NEVER GIVEN AN OPPORTUNITY TO HAVE ONE DESPITE HIS REPEATED REQUESTS FOR ONE.

Petitioner claims that the en banc panel's remand order directing the district court to hold "another" evidentiary hearing on the issue of whether hanging is cruel and unusual punishment" should be vacated because Campbell "has already received an evidentiary hearing on that issue in 1989." Petition for Extraordinary Writ, at 13. In truth, Campbell never had an evidentiary hearing on the hanging issues.

The en banc panel of the Ninth Circuit specifically ordered the parties to fully brief the issue of whether Campbell had ever requested, and had ever been afforded, an evidentiary hearing on his hanging claims. The order issued on January 29, 1993 (9 days after the oral argument) provided that the parties were to brief, inter alia, the following issues:

> 1. Did the district court err in failing to grant Campbell's request for an evidentiary hearing to establish whether hanging pursuant to the Washington statute (including hanging per se, the use of an unqualified hangman, and the choice between hanging and lethal injection) is cruel and unusual under the Eighth Amendment?

a. Has a state court trier of fact previously held an evidentiary hearing on this issue?

    1. If so, was it a full and fair hearing?

b. Has the district court previously held an evidentiary hearing on this issue?

    1. If so, was it a full and fair hearing?

    2. If a hearing was held, but it was not full and fair, is this attributable to an error or abuse of discretion on the part of the district court?

    3. If a hearing was held, but was not full and fair, was this due to any waiver by Campbell of his rights?

c. If a hearing on the issue of whether hanging pursuant to the Washington statute constitutes cruel and unusual punishment has not previously been held by the district court, has Campbell waived his right to such a hearing?

Order Withdrawing Submission and Ordering Briefing, January 29, 1993.

Counsel for respondent Campbell addressed each of these issues in his Supplemental Brief, filed February 19, 1993, a copy of which is appended to this brief as Appendix B. Respondent Campbell

refers the Court to pages 1-15 of that Supplemental Brief, where each of the issues listed above are addressed.

Although Blodgett repeatedly asserts that the District Court gave Campbell the opportunity to present whatever evidence he wished to present, Blodgett fails to back up this assertion with any citation to the record. Petition for Extraordinary Writ, at 19.

In March of 1989 respondent Campbell was being represented by attorneys who had just been appointed on March 8, 1989. The attorneys, Robert Gombiner and Al Lyons, had been appointed by the Washington Supreme Court, to represent Campbell in that state court. The Washington Supreme Court denied Campbell's request for a stay of execution on Thursday March 23, 1989.

On March 24, although no case had yet been filed in the United States District Court, the Honorable John C. Coughenour, asked attorneys Gombiner and Lyons to attend a status conference. Petitioner Blodgett erroneously asserts that at this status conference the District Court judge put the attorneys on notice that they should come prepared to present evidence in support of

Campbell's claim that hanging is a cruel and unusual punishment. In fact, the transcript of this hearing unambiguously demonstrates that the District Court Judge told the attorneys that on the following Monday he would address the issue of whether he would grant a stay of execution, and that he might hold an evidentiary hearing on the issue of whether Campbell's trial attorneys had rendered ineffective assistance of counsel when they permitted Campbell to absent himself from the two week long jury voir that was conducted in Spokane, Washington:

> THE COURT: . . . It seems to me that an application for a stay accompanied by an initial identification of habeas issues needs to be filed very quickly. In the event that a stay is granted, that habeas petition may and probably would be amended at some point after the initial flurry of paper.
>
> MR. GOMBINER: Your Honor, that in fact was our thinking on the subject, and we in terms of a time frame, we had planned on filing in this Court at the opening of business on Monday morning a motion for a stay of execution and a habeas petition. We believe that is the earliest we could --
>
> THE COURT: I think it would be unfair of me to ask you to do anything different than that, and I think that is a responsible and reasonable approach.
>
> What I'd like to suggest, then, is that you do that at 11:00 o'clock on Monday. We will be prepared to deal with both of

those and go from there, see where we stand and what we are going to do. It may be we'll have a full hearing at that time. It may be nothing more will happen at that time than the issuance of a stay. But at least we'll be further along.

Does that make sense to the State?

* * *

THE COURT: . . .

It may also be, and I'm speaking now to the Marshal Service, that it would be advisable for Mr. Campbell to be here on Monday. In the event we have an evidentiary hearing, at that time he will be required to be here. And I appreciate the logistical problems that creates, but I think it would be the wisest course of action.

It may also be that it would be advisable to have Mr. Savage and Mr. Mestel on a standby basis in the event there is an evidentiary hearing on the ineffective assistance of counsel issue.

Verbatim Report of Proceedings, March 24, 1989, at 49-50 (emphasis added). At no time did the District Court Judge ever suggest that he expected Campbell's attorneys to go forward with an evidentiary hearing on the hanging issues.

On March 27, 1993 Campbell's attorneys did file a habeas petition and a motion for a stay of execution. They did appear in Court and they did present the testimony of Campbell's trial attorneys regarding the issue of ineffective assistance of

counsel.[6/] They also presented the testimony of two expert witnesses who addressed the issue of ineffective assistance of counsel.

When arguing to the District Court that Campbell was entitled to a stay of execution, attorney Gombiner specifically stated that he also wished to present evidence at a later date in support of Campbell's claim that hanging was a cruel and unusual punishment:

> MR. GOMBINER: . . . Now, we have also, and I am not going to go on and on, the Court has read the motion, we have alluded to a number of other significant issues, one of which is the question of whether hanging is per se unconstitutional.
>
> There is another issue that the Supreme Court has never addressed since it reinstated the death penalty. We would certainly be entitled to an evidentiary hearing on that issue.

Verbatim Report of Proceedings, March 27, 1989, pp. 62-63 (emphasis added).

Contrary to the implication of petitioner Blodgett, the District Court Judge did not respond by advising counsel that he should present evidence in support of the hanging claim at that moment at that hearing. The District Court Judge did not

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[6/] Verbatim Report of Proceedings, March 27, 1989, pp. 6-36, and 38-53.

suggest that March 27, 1989 was ever intended to include an evidentiary hearing on that issue.

Petitioner Blodgett quotes out of context a remark made by the District Court Judge when Campbell's expert witness Professor John Strait was testifying on the issue of ineffective assistance of trial counsel.[7/] Professor Strait testified that in his opinion attorney Gombiner had not had an adequate opportunity to prepare for the evidentiary hearing on ineffective assistance of counsel, and implied that the District Court judge was forcing attorney Gombiner to go forward with the evidentiary hearing on that issue, even though Gombiner was not adequately prepared to address the ineffective assistance of counsel issue:

> MR. STRAIT: . . . I would also want time, if I were trial counsel [for the habeas petitioner Campbell] on an evidentiary hearing, to provide an expert witness or expert witnesses with an opportunity to review the record and review the results of my investigation and to give me an opinion in private to indicate what the nature of that opinion would be and then to prepare that witness for testimony.
>
> I would want an opportunity, depending on what information I got from the [state court] trial counsel, from Mr. Campbell,

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[7/] Petitioner fails to give any page citation to the quotation and fails to note that at least initially the Court was addressing the witness, Professor Strait.

> from previous counsel that represented Mr. Campbell on appeal and on post-conviction relief regarding that issue, to do further investigation in order to assemble the testimony for this kind of hearing. My experience leads me to believe that the one factual shot you get at a hearing on federal habeas in a death penalty case is not something you come into with 48 hours notice and a few literally minutes of witness investigation and preparation with a man's life at stake. And literally that one shot being your best shot at setting your evidentiary record for how those issues deprived him of a fair trial and justify the time, expense and energy required to go back and retry the defendant under circumstances like that, it requires the most careful preparation and investigation. Not the kind of thing that you would do before a routine uncontested motion, which is essentially what is going on today.

Verbatim Report of Proceedings, March 27, 1989, at 102-103 (emphasis added).

The District Court Judge stated that he was insulted by Professor Strait's remark, and made it clear that he was simply giving attorney Gombiner an opportunity to present whatever evidence he wished to present on the issue of ineffective assistance of counsel:

> THE COURT: Mr. Strait, your characterization of what is going on here today I find a little offensive.

Verbatim Report of Proceedings, March 27, 1989, at 103.

Counsel for petitioner has quoted the following remarks of the District Court Judge:

> If you had the opportunity to have been present at last Friday's hearing, I think you would agree that the Court was trying to accommodate counsel and telling counsel that if you wanted to put on evidence, I'd be happy to hear it and setting everything aside so that we could accomplish that. I'm not forcing anybody to go through with this hearing. If you don't want to go forward with putting on evidence, that is fine. We'll stop right now.

Verbatim Report of Proceedings, March 27, 1989, at 103-104.

When read in context, it is clear that the District Court judge was simply saying that Campbell's attorneys were free to present whatever evidence they wished to present in support of the claim of ineffective assistance of counsel. They should not be taken out of context, as petitioner Blodgett has done, in order to support the contention that the Judge was advising counsel that he could or should present evidence in support of the hanging claims. At no time did the District Court judge ever give Campbell's attorneys an opportunity to present evidence in support of the hanging claims.

V.

DISCOVERY PROCEEDINGS AND INTENSIVE PREPARATION FOR THE MAY 24-26 EVIDENTIARY HEARING ARE ALREADY UNDERWAY. THE ENTIRE REMAND HEARING WILL BE COMPLETED AND THE CASE RETURNED TO THE EN BANC PANEL BY NO LATER THAN JUNE 2, 1993.

Petitioner Blodgett fails to mention any of the prehearing proceedings and preparation which were well under way by the time he filed his initial application with Justice O'Connor and which had largely concluded before he filed the instant petition. On May 4, 1993 the parties appeared before the District Court for a status conference. To begin with the District Court granted undersigned counsel's request for appointment of co-counsel. Seattle attorney Jeffrey Cohen has been appointed to assist undersigned counsel at the evidentiary hearing.

The District Court asked the parties how many days they believed would be necessary for the hearing. Counsel for Campbell felt that the hearing would require 2-3 days. Counsel for Blodgett requested 5 days. The District Court decided to provide for three days of live testimony.

Respondent Campbell also moved, on May 4th, for permission to conduct discovery pursuant to Rule 6 of the Rules Governing §2254 Proceedings.

The District Court granted Campbell's motion for leave to serve Requests for Production. Two days later the District Court also granted Campbell's motion for leave to serve interrogatories upon petitioner Blodgett. The District Court also granted Campbell's motion for the setting of a discovery schedule. The Court set May 13, 1993 as the cutoff date for the parties to identify their expert witnesses, and May 17th as the cutoff date for responding to requests for production and interrogatories. At no time during the hearing on May 4th did counsel for Blodgett ever suggest that they would be opposing the holding of the evidentiary hearing.

On May 7, 1993 Campbell served his requests for production upon Blodgett. On May 10, 1993, for the first time, Blodgett gave notice of his opposition to the evidentiary hearing, by filing a motion for reconsideration in the Ninth Circuit. Significantly, it was not until after the District Court had made it clear that Campbell would be permitted to conduct prehearing discovery, that Blodgett took steps to vacate the Ninth Circuit's remand order.

Campbell's counsel immediately identified one of their expert witnesses, Dr. Deryk James, at the status conference held on May 4th. The District Court orally approved Campbell's request for funds to pay for Dr. James transportation from Cardiff, England to Seattle, Washington. Dr. James is a Professor at the University of Wales School of Medicine and a forensic pathologist. After a telephone conference with the District Court on May 6th, with the District Court's approval, Dr. James purchased his ticket and flew to the United States where he has met with Campbell's attorneys.[8/]

During the week of May 17-21, counsel for Campbell took the depositions of the State's four expert witnesses, counsel traveled to Albuquerque, New Mexico and deposed Dr. Ross Zumwalt; to Vancouver, British Columbia, for the deposition of Dr. James Feris; to Portland, Oregon, for the deposition of Dr. William Brady; and to San Francisco to depose Dr. Boyd Stephens. Similarly,

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[8/] Dr. James is, to the best of our knowledge, the only forensic pathologist in the world who has ever undertaken a systematic examination of the skeletons of persons who were executed by judicial hanging. The results of his studies have been published. A copy of his article was a part of Campbell's offer of proof filed on February 19, 1993 in the Ninth Circuit. A copy of that article is attached hereto as Appendix C.

counsel for respondent Blodgett took the depositions of petitioner's expert witnesses: Dr. Deryk James of Cardiff, England, and Drs. William Longstreth, Daniel Graney and Allan Tencer, all of whom are faculty members at the University of Washington School of Medicine in Seattle, Washington. Petitioner's expert witnesses teach in the fields of forensic Pathology, Neurology, Anatomy, and BioMechanics, respectively. Each of them testified in support of Campbell's claim that hanging is cruel and unusual. On May 24, 1993 the evidentiary hearing commenced. By the time this Court confers on Respondent's Petition, the hearing will be over.

Notwithstanding all that has taken place already, petitioner Blodgett is suggesting that this Court take action to prevent the District Court from concluding the hearing or, in the event the hearing has been completed before the petition is decided by this court, to prevent the en banc panel from considering the evidence adduced at the hearing. Petition for Extraordinary Writ at 2 n.3. Petitioner alleges that this extraordinary relief is necessary because the State of Washington will be "irreparably harmed" if the hearing takes place

and the en banc panel is permitted to consider the evidence brought forward at the hearing. It is worthy of note that petitioner made this argument for the first time only after it had undertaken discovery in preparation for the hearing that included the deposition testimony of respondent's nationally and internationally recognized experts in forensic pathology, neurology, biomechanics, and anatomy, to the effect that hanging as a method of execution produces a high likelihood of a slow, painful, torturous death and can cause decapitation or disfigurement in the process. The only conceivable "prejudice" that the State might suffer from the remand order is that Campbell may succeed in proving that hanging is a cruel and unusual punishment. This is not the type of "irreparable harm" that warrants issuance of an extraordinary writ.

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VI.

FOR THE FIRST TIME, IN FEBRUARY OF 1993, THE STATE RAISED A CONTENTION THAT CAMPBELL HAD FAILED TO ADEQUATELY PLEAD HIS CLAIMS REGARDING HANGING. THE STATE DID NOT RAISE THIS ARGUMENT UNTIL AFTER THE EN BANC PANEL HAD ORDERED THE FILING OF SUPPLEMENTAL BRIEFS, NEARLY FOUR YEARS AFTER THE PROCEEDINGS IN THE DISTRICT COURT.

The State now claims that Campbell's claims pertaining to the unconstitutionality of hanging were not pleaded with sufficient particularity to entitle him to an evidentiary hearing. It should be noted that the State failed to make any such argument in the District Court; failed to make any such argument to the three judge panel of the Ninth Circuit, and raised the argument for the first time in its supplemental brief filed after oral argument to the en banc panel. Any such contention was clearly waived long ago, and is frivolous in any event.

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VII.

RESPONDENT CAMPBELL FILED A LENGTHY OFFER OF PROOF IN THE NINTH CIRCUIT, IN WHICH HE SET FORTH THE TYPE OF MEDICAL AND HISTORICAL EVIDENCE WHICH HE WISHED TO PRESENT IN SUPPORT OF HIS CLAIM.

Although petitioner Blodgett implies that an evidentiary hearing is uncalled for because no evidence exists to support Campbell's claim, petitioner fails to mention that Campbell filed an Offer of Proof in the Ninth Circuit that was over 100 pages long. In his Offer of Proof petitioner assembled both medical and historical data indicating that execution by hanging often results in slow strangulation of the condemned prisoner, and occasionally results in decapitation with the head being pulled right off the neck. Excerpts from respondent Campbell's lengthy Offer of Proof are attached hereto as Appendix D. See also Appendix B, Supplemental Brief of Appellant, Campbell v. Blodgett, No. 89-35210 (9th Cir. 1993) at 21-27. Subsequently, additional powerful evidence of the torturousness of hanging has been developed and presented to the District Court. Both during discovery and at the evidentiary hearing on this issue, expert testimony has been presented demonstrating that death by judicial hanging can take

anywhere from a few seconds to more than half an hour and that, depending on the specific mechanisms that come into play, the hanging victim may remain conscious for minutes while he thrashes about and struggles for brief. Additionally, Respondent produced substantial evidence that decapitation is a very real risk under the procedures used by the State of Washington.

Dr. Deryk James testified that he has conducted a scientific examination of the skeletons of 34 people hanged in Great Briton between 1882 and 1945. According to prison records of these hangings, the victims were hanged by means of the "long drop" method, the same method used by the State of Washington. Dr. James found that the so-called "hangman's fracture" of the second cervical vertebrae occurred in only six of the 34 hanging victims whose skeletons he examined. Based on his findings, Dr. James concluded that death in the case of a judicial hanging may result from any one, or a combination of several, of the following mechanisms: skull fracture, damage to the spinal cord, compression of the carotid artieries, compression of the venous system, occlusion of the airway, reflex cardiac arrest, or decapitation.

Dr. William Longstreth, Chief of Neurology at Harborview Medical Center and an Associate Professor in the School of Medicine at the University of Washington, testified by deposition that even in the case of a functional transection of the spinal cord above the third cervical vertebrae, though the individual will become paralyzed immediately, the resulting lack of movement does not equate to unconsciousness. Rather, the respiratory system will cease to function and the hanging victim will retain consciousness until the oxygen level in his blood falls so low that the brain can no longer function. This, according to Dr. Longstreth, can take up to two minutes. In the intervening time, the person is aware of his inability to breath and is likely to experience severe distress, much as an individual who is drowning. The same time frame applies where the hanging victim suffered only a partial occlusion of the airway, or damage to the spinal cord only partially impaired respiratory function.

Dr. Daniel Graney, a Professor of Anatomy at the University of Washington, testified by deposition about the liklihood that judicial hanging causes complete occlusion of the blood vessels

leading to the brain. The major blood vessels to the brain are the carotid and vertebral arteries. While the common carotids are relatively easy to compress in the lower part of the neck because there they are close to the surface, as they move farther up the neck, they branch into the external and internal carotids. The external carotids are essentially irrelevant for purposes of the issue of consciousness, since it only supplies blood to the face. The internal carotids are more medially located as they move into muscle, and thus become much more difficult to occlude. The vertebral arteries are even more difficult occlude as they run through the spinal column through holes in the cervical vertebrae. Based on the procedures in effect for hanging in Washington, and the requirement that the knot in the noose be placed behind the left ear, Dr. Granny testified that in his opinion there is a reasonable likelihood that not only would the vertebral arteries not be compresed in the case of a judicial hanging in Washington, but that at least one of the carotid arteries would also be open and unoccluded after the drop.

Finally, Dr. Allan Tencer, a biomechanical engineer working in the field of orthopaedics,

provided deposition testimony and is expected to testify at the hearing that hanging is highly variable and that one cannot predict the nature and extent of spinal cord injury based solely upon knowledge of the weight of the victim and the length of the drop (the only factors considered in Washington's protocol). Dr. Tencer will testify that decpitation is very real possibility using the procedures manual developed for Washington State Penitentiary hangings. In Dr. Tencer's opinion, it is impossible to design a hanging procedure that can be relied upon to produce cervical injury without running a serious risk of decapitation. Corroborative of Dr. Tencer's opinion, ancient documents were admitted at the hearing relating instances of decapitation as a result of judicial hangings.

VIII.

WHETHER HANGING IS CRUEL AND UNUSUAL PUNISHMENT IS AN ISSUE THAT HAS NEVER BEEN ADDRESSED BY ANY FEDERAL COURT, AND NO COURT, STATE OR FEDERAL, HAS EVER HELD AN EVIDENTIARY HEARING ON THIS ISSUE. IT IS CLEARLY AN IMPORTANT ISSUE OF FIRST IMPRESSION.

Petitioner Blodgett concedes, as he must, that no federal court has ever addressed the question

whether hanging is cruel and unusual punishment. Instead, petitioner suggests that because hanging is a "traditional" method of execution, it should be obvious that Campbell will never be able to succeed in proving that it is constitutionally impermissible. Petitioner Blodgett fails to note that although execution by hanging was once the usual method of execution in the United States, there are only two states which still execute by means of hanging today.

Over the years the practice of capital punishment had undergone marked changes:

> One significant change has been in our methods of inflicting death. Although this country has never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly more humane methods of electrocution in the late 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased.

Furman v. Georgia, 408 U.S. 238, 296-97, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Brennan, J. concurring) (emphasis added).

At the time Furman was decided, Justice Brennan noted that "Eight states still employ hanging as the method of execution . . . " Id. at 297, n.50. By 1981, when the Washington Supreme

Court discussed, in pure dicta, the issue of whether hanging was cruel and unusual, the number of States that still employed hanging as a means of execution had dwindled to three: Washington, Montana and Delaware. See Frampton, 95 Wn.2d at 492 (Opinion of Justice Dolliver). By 1989 the number of states still using hanging as a means of execution had shrunk to two.

In State v. Campbell, 112 Wn.2d 186, 192, 770 P.2d 620 (1989), the Washington Supreme Court stated that since its prior "decision" in Frampton, "two other states have upheld statutes providing for execution by hanging." As noted below, this statement is misleading at best, however.

The Washington Supreme Court cited to DeShields v. State, 534 A.2d 630 (Del. 1987), cert. denied, 108 S.Ct. 1754 (1988), and McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981). The Delaware decision, however, cannot fairly be characterized as holding that hanging is constitutionally permissible. In fact, the Delaware Court held that the death row inmate, Kenneth DeShields, (1) had no standing to raise the issue of whether hanging was cruel and unusual punishment per se;

and (2) even if he did have standing, he had failed to offer any evidence to establish that hanging causes the infliction of unnecessary pain or a lingering death. DeShields, at 639-640. Because DeShields based his argument "solely on legislative comments made during the debate," Id. at 639, on the successful amendment which replaced hanging with death by lethal injection, the Delaware Supreme Court found it had no evidentiary basis upon which to evaluate a claim that death by hanging, if properly performed, was unconstitutionally cruel.

Far more significant than the DeShields opinion, is the fact that the Delaware Legislature did away with hanging as the means by which executions are to be carried out in that state. Delaware now provides that all executions shall be carried out by lethal injection.[9/]

[9/] 11 Del.C. §4209(f) provides in pertinent part:

"Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Corrections."

(The statute does provide that in the event that death by lethal injection is held unconstitutional, then the method of execution in Delaware shall revert to being death by hanging.)

The Montana decision in McKenzie simply contains a two sentence statement that the Montana Supreme Court refused to reconsider its prior decision in State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979).[10/] That prior decision, however, dealt solely with the contention that hanging is cruel and unusual even when it is carried out in such a manner as to produce immediate death.[11/] That is not the contention that petitioner Campbell makes here. Moreover the Coleman opinion states that the petitioner, unlike Campbell, made no attempt to present any evidence that hanging can result in a slow and/or painful death. Thus the Montana case law simply does not speak to the issues raised here. In sum, at present only two

---

[10/] "McKenzie attacks the imposition of a death penalty by hanging as cruel and unusual punishment. We discussed this issue in Coleman II, 605 P.2d at 1058-1059. This issue has been fully decided by this Court." McKenzie, 640 P.2d at 382.

[11/] "Coleman's contention here is that hanging, even if carried out exactly, so that death results from a broken neck, is cruel and unusual punishment. The State responds that there is no evidence in this case that shows that death from hanging, when properly carried out, is anything other than swift and immediate, or that hanging results in any more suffering than that associated with electrocution or other modes of execution." Coleman, 605 P.2d at 1058-59.

States -- Washington and Montana -- provide for death by hanging.

That only two States now use hanging as their means of execution, is strong evidence that hanging is no longer a constitutionally permissible form of punishment. The Eighth Amendment Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 2 L.Ed.2d 630, 78 S.Ct. 590 (1958). The Clause "may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378, 54 L.Ed. 793, 30 S.Ct. 544 (1910).

This Court has often looked to see how many other jurisdictions authorize the imposition of a particular sentence when deciding whether that sentence is unconstitutionally cruel and unusual. For example, in Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed 345 (1879), this Court concluded that since execution by firing squad was common, it was not unconstitutional. In Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977), on the other hand, this Court held that since only three

States still provided for the possibility of sentencing a person to death for the crime of rape, that the death penalty was unconstitutional as applied to the crime of rape.[12/] See also Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982) (after noting that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to death", the Court concluded that death was an

---

12/ "As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for the rape of an adult woman. At no time in the last 50 years has a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just prior to the decision in Furman v. Georgia, that number had declined, but not substantially, to 16 States plus the Federal Government. . . .

Coker, at 593 (emphasis added).

Following the Furman decision, the number of states authorizing a sentence of death for rape dwindled further:

"It should be noted that Florida, Mississippi and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult . . . The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child."

Coker, at 596.

unconstitutionally excessive punishment for felony murder where defendant did not take life, attempt to take life, or intend that a life be taken).

The teaching of these cases is clear. Since only two states presently authorize execution by hanging, contemporary standards of decency, the touchstone of Eighth Amendment analysis, have evolved to render unconstitutional the use of hanging as a means of execution.

Petitioner Blodgett argues simply that since execution by electrocution has been approved by courts in the past, execution by hanging must be constitutionally permissible as well. This argument borders on frivolous. It is fallacious to suggest that simply because there is precedent to support the constitutionality of one method of execution -- a method used by many states today -- that a challenge to another method of execution -- a method used only in two states -- is bound to fail.

IX.

CONCLUSION

Respondent Campbell respectfully asks that petitioner Blodgett's Petition for an extraordinary

writ be denied. Petitioner Blodgett has failed to demonstrate that the en banc panel of the Ninth Circuit abused its discretion in ordering the remand. The scheduled hearing will be over in two weeks. The State of Washington appears to be seeking to prevent the hearing only because it knows that respondent Campbell is preparing to present compelling evidence in support of his claims.

DATED this 25TH day of May, 1993.

James E. Lobsenz

Attorney for Respondent Campbell

APPENDIX A

RECEIVED
DATE JAN 19 1993
CARNEY BADLEY
SMITH & SPELLMAN, P.S.

NOT FOR PUBLICATION

FILED
JAN 14 1993
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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES CAMPBELL,

Petitioner-Appellant,

-vs-

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

No. 89-35210

D.C. No. CV-89-456-C

ORDER

Before: WALLACE, Chief Judge.

The en banc court has voted to grant Campbell's motion to dismiss the law firm of Betts, Patterson & Mines, P.S., Steve W. Berman, David M. Otto, and Kimberly A. Quach as his counsel, and substitute the law firm of Carney, Badley, Smith & Spellman and James E. Lobsenz on the condition that, by January 15, 1993, (1) Lobsenz files with the clerk his written appearance and (2) Campbell and Lobsenz file with the clerk a signed statement waiving any claim for a continuance of the oral argument of the above case now scheduled for January 20, 1993, at 1:30 p.m. in San Francisco, California.

AO 72
(Rev.8/82)

APPENDIX B

NO. 89-35210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES RODMAN CAMPBELL,

Petitioner/Appellant,

v.

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents/Appellees.

SUPPLEMENTAL BRIEF OF APPELLANT

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A. PROCEDURAL HISTORY OF LITIGATION OF CONSTITUTIONAL CLAIMS PERTAINING TO HANGING

In 1982 Charles Campbell was convicted of aggravated murder in Snohomish County Superior Court, and sentenced to death. On direct appeal the Washington Supreme Court affirmed his convictions and his death sentence. State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985).

On May 17, 1985 the trial court set an execution date of July 25, 1985. Petitioner then filed an emergency motion for a stay of execution and a motion for appointment of counsel in the Washington Supreme Court. On June 25, 1985 the Washington Supreme Court appointed Raymond Thoenig to represent Campbell. On July 9, 1985 Mr. Thoenig filed a motion for a stay of execution in which he advised the Court that he had not yet finished reading the 2,000 pages of clerks papers and the 3,500 pages of trial transcript. Mr. Thoenig identified several meritorious issues, and asked for a stay of execution and time to finish reviewing the record and to prepare and file a personal restraint petition. On July 18, 1985 the Washington Supreme Court denied Campell's motion for a stay of execution, and entered an order stating that the motion for a stay had been treated "as if" it were a personal restraint petition, and that such "petition" was denied. Three Justices dissented stating that they believed a stay of execution should have been issued.

Four days later on a Monday morning petitioner filed a federal habeas corpus petition in United States District Court. The District Court refused to permit Campbell to include any claims that had not been previously identified by attorney Thoenig in his July 9, 1985 motion for a stay of execution. The Court ultimately

denied any relief to Campbell, and Campbell appealed. A panel of this Court affirmed the denial of any relief in a split decision Campbell v. Kinchloe, 829 F.2d 1453 (9th Cir. 1987)(" Campbell I). The Supreme Court again denied certiorari on November 7, 1989 and Campbell's petition for rehearing on January 9, 1989.

In December of 1988 Campbell again filed a motion in the Washington Supreme Court asking that he be provided appointed counsel to prepare a personal restraint petition on his behalf. The Court denied this motion in a split decision in which four justices of the Court filed a dissenting opinion.

On February 15, 1989 Campbell was brought before the Honorable Joseph Thibodeaux of the Snohomish County Superior Court for a hearing on the State's motion to set a new execution date. At that hearing Campbell personally raised the issues regarding the constitutionality of the statute directing that the method of execution be hanging unless the defendant chose the alternative of lethal injection:

> THE DEFENDANT: Sir, I have one other issue to bring up now that you've set a date.. Under RCW 10.95.180, there's a question of the, you know, the method of execution. In the past, the Department of Corrections has attempted to fulfill this section of the statute, and I believe that is incorrect. In 1985 they attempted to have me elect to choose my own form of execution, and I refused to sign the slip. I wrote on it, "I refuse to sign this because it is in violation of my First, Fifth, Eighth, Ninth and Fourteenth Amendment rights. Now the Department of Corrections was in no position to deal with whether or not my rights were being violated, whether or not choosing my method of execution would be cruel in my circumstances.
>
> I believe that the Court is the proper authority to decide or at least address the issue of the method of execution under the statute, because it is the Court that was in the position and has the means to address the constitutional concerns and issues regarding this.

> And I would point out that in State v. Rupe, 101 Wn.2d 664, 1984, the Court specifically addressed the constitutional question regarding the choice of execution, and the Court specifically held that you cannot just allege something, you have to demonstrate that there's going to be a problem with the method of execution, and like if there's going to be psychological problems, etc., you have to demonstrate that and allege that having to aid in your own demise is going to affect you in some way.
>
> And for those reasons, I believe that that is why the Court should be the one in this situation to inquire about the method. And at that point I would like to make a statement regarding the constitutionality of that section of the statute and that is violating my beliefs to aid and abet in my own suicide.

Transcript, 2/15/89 at 20-21.

Judge Thibodeaux refused to consider this issue and refused to conduct any hearing regarding Campbell's allegations:

> THE COURT: Mr. Campbell, it is the Court's opinion that the issue you now raise is beyond the scope of this hearing, and I am not going to consider it.
>
> THE DEFENDANT: Thank you.

Transcript, 2/15/89 at 21.

On March 3, 1989 Campbell filed yet another request for appointment of counsel. On March 8, 1989 the Washington Supreme Court granted Campbell's motion for appointment of counsel, appointed attorneys Al Lyon and Robert Gombiner to represent Mr. Campbell, and then gave these newly appointed attorneys 8 days in which to file a brief setting forth any potentially meritorious issues which had not been litigated in the previous direct appeal, or mentioned in the previous 1985 motion for stay of execution.

On March 7, 1989 Campbell filed a notice of appeal to the Washington Supreme Court, appealing from the February 15th trial court order setting a new execution date of March 30, 1989. On March 8, 1989 the Washington Supreme Court entered an order

directing that the brief of appellant in that case (No. 55977-5) be filed by appointed counsel within 8 days by March 16, 1989.

On March 16, 1989 appointed counsel Al Lyon filed a brief in which he raised the contention that "it is cruel and unusual punishment to require a defendant to make an election as to how he will die when the individuals religious beliefs prohibit him from participating in his own demise." (Appellant's Brief, 7). Lyon specifically noted that the Washington Supreme Court had left this issue open, for resolution in an appropriate case where the defendant alleged that he would suffer severe psychological harm if required to choose the method of his own execution:

> Requiring Mr. Campbell to make an election as to the manner his life [sic] will be taken places him in the untenable position of becoming a party to his death in direct violation of his religious beliefs.
>
> This Court has previously considered the issue of whether or not providing the defendant with the choice of how to die was in and of itself a violation of the Eighth Amendment prohibition against cruel and unusual punishment. On such challenge, the Court found that providing the choice itself was not cruel and unusual. State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984).
>
> However, the Rupe court left open the question of how to deal with the case where the individual would suffer some sever [sic] psychological harm if required to elect between the two methods of death. Without any further evidence of what, if any, emotional trauma the defendant would suffer by forcing him to make the choice between hanging or lethal injection, the Court refused to find that forcing the defendant to make a choice was cruel and unusual. Rupe, supra at 702. The Court left open the question of whether forcing a defendant to make an election would be cruel and unusual to the particular case, and simply ruled that the question in the abstract does not violate the constitutional protection against cruel and unusual punishment. Rupe, supra, at 702. That determination must then be done on a case by case basis depending [sic] the circumstances and the individual.

(Appellant's Brief, 8-9.) Campbell's attorney noted that "Campbell made it clear to the [trial] Court that he was terrified of

hanging, but also that he was unable to participate in any sort of election between the two options on religious grounds." (Appellant's Brief, 9.)[1/] In addition counsel specifically addressed the issue of whether the choice of execution method statute violated the First Amendment, as well as the Eighth Amendment. (Brief of Appellant, at pp. 10-11).

In response the attorneys for the State of Washington argued that the trial court had acted properly in refusing to consider the issues regarding hanging, because the issues were premature. The State argued that at the time of the February 15, 1989 hearing on when to set the execution date, there was no death warrant yet in existence, and thus it was premature to litigate issues regarding how the Superintendent of the state penitentiary would carry out the provisions of the death warrant:

> Obviously, at the time of the hearing, the superintendent of the state penitentiary had not even received the death warrant. The superintendent could not have taken any actions with respect to that warrant which would affect any rights of the defendant. Therefore, the court could not have had before it any facts which could have created an issue which could have been resolved at that time.

Brief of Respondent, at pp. 8-9.

[1/] Campbell has explained in detail why he is particularly afraid of hanging:

"In this regard petitioner asserts that in general the cause of death by hanging is suffocation or strangulation and petitioner has deep seated fears of death in these manners from being severely traumatized as a child on numerous occasions and as an adult including having almost died on several occasions from respiratory problems and from being intentionally choked out. Petitioner has also experienced being hung first hand wherein petitioner attempted suicide by hanging but was saved by a jailer."

Pro Se Supplemental Brief of Petitioner, No. 85-35210, at 24. Campbell specifically requested an opportunity to collect and present as evidence his childhood medical records which would document his claims.

In the alternative the State argued simply that the statute, RCW 10.95.180, did not require the defendant to make an election between hanging or lethal injection. Brief of Respondent, at p. 9.

In addition to his attorney's brief, Campbell filed his own pro se supplemental brief in the Washington Supreme Court. In his brief Campbell not only addressed the First and Eighth Amendment constitutional claims which flowed from the statutory provision allowing a death row convict to escape hanging by opting for lethal injection, but also raised a claim that hanging per se was a cruel and unusual form of punishment.

On pages 13-18 of his pro se supplemental brief Campbell specifically asked the Washington Supreme Court to reconsider its prior decision in State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) in which a majority of the Court stated in dicta that hanging was not per se cruel and unusual punishment.

On pages 19-20 of his pro se supplemental brief Campbell raised the issue of whether subjecting a death row inmate to a choice between methods of execution violated his constitutional rights. He accurately asserted that he had "requested the trial court to conduct an inquiry into the problems of his having to choose under this section but the Court refused to listen." Pro Se Supplemental Brief, at p. 20. Campbell further asserted:

> It is Petitioner's position that (a) Death by hanging is cruel and unusual (b) that death by hanging is so psychologically distressing and frightening to petitioner that the fear of being hung will force petitioner to violate his religious beliefs against killing and suicide which are protected under the First Amendment to the U.S. Constitution and Art. 1, sec. 11, Amend. 34 of the Washington State Constitution, by forcing petitioner to actively take part in his own demise in order to escape death by hanging. And the court should have conducted a hearing to allow Petitioner an opportunity to demonstrate

the relevant facts that are necessary to this claim under State v. Rupe, 101 Wn.2d 664, at 702 (1984).

Pro Se Supplemental Brief, at p. 20 (emphasis added).

On March 23, 1989 the Washington Supreme Court issued a decision denying Campbell's motion for a stay of execution. Two justices dissented and would have granted a stay of execution. In its majority opinion, the Washington Supreme Court accepted the State's argument that there was no constitutional problem caused by the statutory option to choose death by lethal injection because the statute did not require Campbell to make an election between hanging and lethal injection. Accordingly, the Washington Supreme Court specifically rejected Campbell's request for an evidentiary hearing on the "choice" issue finding that a hearing was unnecessary:

> Second, Campbell claims that RCW 10.95.180(1) violates his religious principles, by requiring him "to participate in the decision as to how he shall die when his religious beliefs forbid him from participating in any way in the taking of his own life." Brief of Appellant, at 10. [Footnote omitted]. Campbell requests this Court to direct the trial court to conduct a hearing to determine the method of execution.
>
> Campbell's argument is unpersuasive. The challenged statute, RCW 10.95.180(1), provides:
>
> > "The punishment of death . . . shall be inflicted either by hanging by the neck or, at the election of the defendant, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead."
>
> This statute does not "require" Campbell to make a decision, but only permits him to "elect" lethal injection instead of hanging. If Campbell chooses not to participate in the decision, the statute itself will determine the method of execution.
>
> We therefore fail to see what purpose could be served by a trial court hearing. Significantly, Campbell does not even suggest what evidence might be relevant at such a

> hearing. Religious beliefs that bar him from participating in any way in selecting the manner of his death would presumably also bar him from informing the court of his preferences in the matter.

State v. Campbell, 112 Wn.2d 186, 191-192, 770 P.2d 620 (1989).

The Washington Supreme Court also refused to reconsider its prior dictum in Frampton regarding the issue of whether hanging was an unconstitutional method of execution, and thus declined to order an evidentiary hearing on the issues of whether death by hanging was usually a fast or slow death, a torturous or a nontorturous death.

> In his pro se supplemental brief Campbell invites the court to reconsider its decision that execution by hanging does not constitute cruel and unusual punishment under the eighth amendment to the United States Constitution and article 1, section 14 of the Washington State Constitution. See State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). Since we have decided Frampton, at least two other states have upheld statutes providing for execution by hanging. DeShields v. State, 534 A.2d 630 (Del. 1987), cert. denied, 108 S.Ct. 1754 (1988); McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981). We decline to reconsider Frampton.

Campbell, 112 Wn.2d at 192.

On March 27, 1989 petitioner filed a second habeas corpus petition in United States District Court for the Western District of Washington. In that petition he alleged that there was a pending execution date of 12:01 a.m. March 30, 1989 and that he

> will be deprived of his right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States because his execution will be conducted by hanging pursuant to RCW 10.95.180.

Petition, ¶5.16. He further alleged that he

> will be deprived of his right against cruel and unusual punishment and freedom of religion under the First and Eighth Amendments to the Constitution of the United States by forcing petitioner to choose death by lethal injection over hanging when petitioner is terrified at the thought of being executed in such a fashion and the

> possibility of his death being painful and lengthy and petitioner's religious beliefs forbid him from participating in his own demise by electing death by lethal injection over hanging.

Petition, ¶5.18.

On the same day on which the petition was filed, Campbell's new attorney Robert Gombiner appeared before the District Court and argued a motion for a stay of execution. In the course of his argument Mr. Gombiner advised the District Court that one of the issues raised in Campbell's petition was "the question of whether hanging is per se unconstitutional." Transcript, 3/27/89, at 62. Counsel argued that this was a significant issue which no federal court had ever addressed, and that Campbell would "certainly be entitled to an evidentiary hearing on that issue." Id. at 62-63. Campbell himself also pointed out that he was raising a claim that the statutory provision which required him to elect death by lethal injection in order to escape from execution by hanging violated his First And Eighth Amendment rights. Id. at 92-93. Campbell specifically complained that he had never been given a chance to present evidence on these issues in the state courts.[2/]

The District Court denied the motion for a stay of execution and summarily denied the petition for a writ of habeas corpus on that same day, in the afternoon of March 27, 1989. Excerpt of Record, 9. The District Court never held an evidentiary hearing on Campbell's method of execution claims. The Court said simply that in its opinion Campbell's claims regarding hanging did not "raise a substantial showing of the violation of a federal right."

[2/] "I did not make, get to make the showing under State v. Rupe that I had intended on." Transcript, 3/27/89, at 93.

Excerpt of Record, 22. The District Court explained that it found "that the Washington Supreme Court's disposition of Campbell's objection to his choice between hanging or lethal injection . . . [did] not violate Campbell's rights under the United States Constitution." Excerpt of Record, 23.

B. ARGUMENT

1. THE DISTRICT COURT ERRED IN FAILING TO GRANT CAMPBELL'S REQUEST FOR AN EVIDENTIARY HEARING TO ESTABLISH WHETHER (a) HANGING IS CRUEL AND UNUSUAL; AND (b) WHETHER DIRECTING THAT THE EXECUTION BE BY HANGING UNLESS THE DEFENDANT CHOOSES TO ELECT DEATH BY LETHAL INJECTION, IS CRUEL AND UNUSUAL.

a. Although Campbell Requested It, No State Court Has Ever Held an Evidentiary Hearing on These Issues.

As evidenced by the above discussion of the procedural history of Campbell's case, no state court has ever held an evidentiary hearing on Campbell's claim that hanging is cruel and unusual per se, or regarding Campbell's claim that requiring him to undergo hanging unless he chooses to elect death by lethal injection, is cruel and unusual, and/or a violation of the First Amendment.

Regarding the claims that pertain to the death row inmate's option to choose death by lethal injection if he wishes to do so, the Washington Supreme Court appears to have changed its course between it's decision in State v. Rupe, supra and State v. Campbell, 112 Wn.2d 186, 770 P.2d 620 (1989).

In Rupe the Washington Supreme Court unambiguously held that whether or not the lethal injection by inmate choice provision of the statute was unconstitutional was something which could only be determined on a case-by-case basis after inquiry into the particu-

lar inmate's claim that he would suffer psychological trauma if forced to face the prospect of being hung unless he chose to be lethally injected:

> Individual reactions to the various methods of execution and the right to choose vary greatly. In some cases, a person may be so appalled by the thought of physically hanging by the neck that the option of death by lethal injection is welcome. To others the idea of lying strapped upon a gurney awaiting the lethal poison to seep into one's veins at an unknown time may be equally abhorrent. These individuals embrace the idea of choosing the method of their death as a way to avoid their own private terrors. But to a third type of individual, the choice itself is cruel. As they await the day of their death, they are faced not only with the terror of death itself, but also with the terror of making the wrong choice on how to die. These individuals do not embrace the idea of choice; they dread its requirement that they take an active part in their own demise.
>
> To resolve this issue either way would require that, in one case or the other, the court's personal view of cruelty prevails over the views of condemned felons. By removing the choice, we impose a cruel punishment upon those who dread a particular method of execution. Retaining the right of choice, on the other hand, may impose severe psychological pressure on those who are frightened of the decision itself.
>
> On balance, on this record, we cannot agree with defendant's assertion that the choice in and of itself is necessarily cruel punishment. The record before us is devoid of any evidence relating to what psychological effect the choice of execution method has upon those sentenced to death. Moreover, defendant does not even allege that he has or will undergo emotional trauma by having to select the method of his own demise. He merely asks, as part of a general constitutional attack on the statute, that this court address the issue in the abstract. To accept defendant's argument would require that we speculate as to whether it is more cruel to impose a choice or a given method of execution. This we decline to do.

Rupe, 101 Wn.2d at 702 (emphasis added).

Notwithstanding the clear holding of Rupe that the constitutionality of the option to choose lethal injection provision depends upon a factual case-by-case assessment of a particular

defendant's psychological processes, in Campbell II the Washington Supreme Court held that the trial court was correct to refuse to hold an evidentiary hearing even though Campbell did make an allegation that he would be psychologically traumatized by having to choose lethal injection in order to escape a method of execution which frightened him.

Moreover, notwithstanding the fact that Rupe explicitly recognized that the mere existence of an option to choose lethal injection could be cruel and unusual punishment for some inmates who dread the prospect of making any choice at all, the Campbell II Court seemingly ignored this holding in Rupe and suggested that the fact that a choice is not required cures any and all potential cruel and unusual punishment claims.[3/]

Petitioner respectfully suggests that it is morally repugnant to ask any condemned person to become a participant in the planning or carrying out of their own execution. It is significant that SS officers at Nazi death camps often insisted that their Jewish prisoners assist in their own executions. Frequently those about to be shot to death were required to dig their own graves, and upon completion of this task, were directed to stand at the edge of the

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[3/] Petitioner respectfully suggests that the Washington Supreme Court was wrong to focus on the evidentiary question of how a particular defendant feels about being given a lethal injection option. Instead, the evidentiary focus should be on whether contemporary moral standards are such that society views it as morally repugnant and cruel to draw a person into the decision making process by offering him the option of choosing one particular form of execution over another. On the other hand, petitioner respectfully suggests that he cannot be faulted for having requested the opportunity to present the type of evidence -- regarding his own personal beliefs and his own psychological thought processes -- which the Washington Supreme Court had previously stated were relevant and outcome determinative in such death penalty cases.

mass grave, so that they would fall into it once shot. One famous death camp survivor described an incident in which a Jewish prisoner managed to assert her own individualism even while being forced to strip and line up for execution in the Auschwitz gas chamber:

> Once a group of naked prisoners about to enter the gas chambers stood lined up in front of it. In some way the commanding SS officer learned that one of the women prisoners had been a dancer. So he ordered her to dance for him. She did, and as she danced, she approached him, seized his gun, and shot him down. She too was immediately shot to death.
>
> But isn't it probable that despite the grotesque setting in which she danced, dancing made her once again a person? . . .
>
> Experiencing that one freedom that not even the concentration camp could take away -- to decide how one wishes to think and feel about the conditions of one's life -- this dancer threw off her real prison. This she could do because she was willing to risk her own life to achieve autonomy once more. <u>If we do that, then if we cannot live, at least we die as men</u>.

B. Bettelheim, <u>The Informed Heart</u> 265 (1965) (emphasis added).

The present Washington statute conferring an option to choose death by lethal injection, has the same morally repugnant effect as the Nazi's attempt to force their prisoners to assist in the process of their own execution. As Bettelheim explains, the Nazis made it unlawful for their prisoners to attempt to commit suicide, not because they did not want the prisoners to die (that, after all, was the whole point of the death camps), but because they wanted to prevent their prisoners from having any say in the manner in which they died.

> Since the main goal of the SS was to do away with independence of action and the ability to make pe4rsonal decisions, even negative ways of achieving it were not neglected. The decision to remain alive or to die is probably a supreme example of self-determination. . . .

> The stated principle was: the more prisoners to commit suicide, the better. But even there, the decision must not be the prisoner's. An SS man might provoke a prisoner to commit suicide by running against the electrically charged fence, and that was all right. But for those who took the initiative in killing themselves, the SS issued (in Dachau in 1933) a special order: prisoners who attempted suicide but did not succeed were to receive 25 lashes and prolonged solitary confinement. Supposedly this was to punish them for their failure to do away with themselves; but I am convinced it was much more to punish them for the act of self-determination.

B. Bettelheim, The Informed Heart 151 (1965).

In the same way that the Nazis made (successfully, in millions of cases) their victims assist in their own execution, the Washington statute has the effect, for those who "elect" lethal injection, of making convicted inmates participants in their own executions. It is this aspect of the statute which makes it unconscionable. Death row inmates are not supposed to commit suicide either. And if they try to commit suicide, they are afforded medical treatment and revived, so that they can later be put to death. The lesson is, you must acquiesce and agree to be put to death in one of the ways which the State has chosen for execution. You may not choose your own way. And for all practical purposes, you cannot refuse to choose. Because if you refuse to "elect" lethal injection, then you have in effect "chosen" death by hanging.

b. The District Court Never Held an Evidentiary Hearing on These Issues.

Although specifically notified that the petitioner had sought and been denied an evidentiary hearing on these claims in state court, and although petitioner's counsel specifically requested an evidentiary hearing on these claims in federal court, the District Court summarily denied Campbell's petition without affording him an

evidentiary hearing on these claims. This denial was premised upon the District Court's conclusion that Campbell's method of execution claims did not "raise a substantial showing of the violation of a federal right." Excerpt of Record, 22.

Apparently the District Court accepted the argument of the State that since Campbell was free to choose death by lethal injection if he preferred that form of execution, the question of whether hanging was cruel and unusual was nonjusticiable. If this was the basis for the District Court's ruling, then the District Court clearly erred. It is well established that the ability of a convicted defendant to choose a constitutionally permissible sentence does not insulate from judicial review the other alternative sentence which the defendant is presented with. United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975)(en banc); United States v. Pierce, 563 F.2d 735 (9th Cir. 1977); United States v. Lowe, 654 F.2d 562 (9th Cir. 1981).

c. Campbell Never Waived His Right to An Evidentiary Hearing on These Issues; He Continuously Asked For a Hearing and Yet Never Received One.

Campbell has continuously requested an evidentiary hearing on these issues in both state and federal court, yet he has never received one.

2. HANGING IS A CRUEL AND UNUSUAL PUNISHMENT.

a. Hanging Has Been Abolished as A Method of Execution in All But Two States: Washington and Montana.

Over the years the practice of capital punishment has undergone marked changes:

> One significant change has been in our methods of inflicting death. Although this country has never

> embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly more human methods of electrocution in the late 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased.

Furman v. Georgia, 408 U.S. 238, 296-97, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)(Brennan, J. concurring). At the time Furman was decided, Justice Brennan noted that "Eight states still employ hanging as the method of execution . . . " Id. at 297, n.50.

By 1981, when the Washington Supreme Court discussed in pure dicta the issue of whether hanging was cruel and unusual, the number of States that still employed hanging as a means of execution, had dwindled to three: Washington, Montana and Delaware. See Frampton, 95 Wn.2d at 492 (Opinion of Justice Dolliver).

By 1989 the number of states still using hanging as a means of execution had dwindled to just two.

In State v. Campbell, 112 Wn.2d 186, 192, 770 P.2d 620 (1989) the Washington Supreme Court stated that since its prior "decision" in Frampton, "two other states have upheld statutes providing for execution by hanging." As noted below, this statement is misleading at best, however.

The Washington Supreme Court cited to DeShields v. State, 534 A.2d 630 (Del. 1987), cert. denied, 108 S.Ct. 1754 (1988) and McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981). The Delaware decision, however, cannot fairly be characterized as holding that hanging is constitutionally permissible. In fact, the Delaware Court held that the death row inmate, Kenneth DeShields, (1) had no standing to raise the issue of whether hanging was cruel

and unusual punishment per se;[4] and (2) even if he did have standing, he had failed to offer any evidence to establish that hanging causes the infliction of unnecessary pain or a lingering death.[5] Because DeShields based his argument "solely on legislative comments made during the debate" (Id. at 639) on the successful amendment which replaced hanging with death by lethal injection, the Delaware Supreme Court found it had no evidentiary basis upon which to evaluate a claim that death by hanging, if properly performed, was unconstitutionally cruel.

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[4] The Delaware statute in effect at the time of DeShields' trial provided that DeShields should be executed by means of hanging. "However, two months later the Delaware Legislature changed the method of inflicting capital punishment from hanging to the intravenous injection of a lethal substance." DeShields, at 639. Moreover the Legislature explicitly provided that any person who committed his capital murder prior to the enactment of the amendment changing the means of execution, "shall be permitted to elect lethal injection, as provided herein, as the method of death." 11 Del.C. §4209(f). Thus the Delaware Supreme Court concluded that since DeShields could avoid death by hanging by choosing execution by lethal injection, he had no standing to argue that hanging was cruel and unusual per se. Moreover, the Court expressly noted that unlike petitioner Campbell, DeShields did not argue "that it is cruel and unusual punishment to force him to choose the manner of his execution." DeShields, at 639. (The Delaware Supreme Court cited to State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) as a case where such a claim had been raised. Campbell explicitly premised his claim upon the holding of Rupe that a statutory provision permitting a death row inmate to escape from hanging only by choosing lethal injection could, under some circumstances, present a valid Eighth Amendment claim.)

[5] "DeShields has not offered any facts for the Court to conclude that hanging, if properly performed, involves the infliction of pain beyond 'the mere extinguishment of life' so as to cause 'unnecessary torture or a lingering death' or unneeded 'terror, pain, or disgrace.' [Citations omitted]. Nor has DeShields offered any evidence to establish that the procedures for hanging are so susceptible to accidents resulting in unnecessary torture or degradation that the choice of hanging as the method of death constitutes a deliberate indifference to the purposeless and needless imposition of pain and suffering." DeShields, at 640.

Far more significant than the DeShields opinion, is the fact that the Delaware Legislature did away with hanging as the means by which executions are to be carried out in that state. Delaware now provides that all executions shall be carried out by lethal injection.[6/]

The Montana decision in McKenzie simply contains a two sentence statement that the Montana Supreme Court refuses to reconsider its prior decision in State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979).[7/] That prior decision, however, dealt solely with the contention that hanging is cruel and unusual even when it is carried out in such a manner as to produce immediate death.[8/] That is not the contention that petitioner Campbell makes here. Moreover the Coleman opinion states that the petitioner, unlike Campbell, made no attempt to present any evidence that hanging can

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[6/] 11 Del.C. §4209(f) provides in pertinent part:
"Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Corrections."

(The statute does provide that in the event that death by lethal injection is held unconstitutional, then the method of execution in Delaware shall revert to being death by hanging.)

[7/] "McKenzie attacks the imposition of a death penalty by hanging as cruel and unusual punishment. We discussed this issue in Coleman II, 605 P.2d at 1058-1059. This issue has been fully decided by this Court." McKenzie, 640 P.2d at 382.

[8/] "Coleman's contention here is that hanging, even if carried out exactly, so that death results from a broken neck, is cruel and unusual punishment. The State responds that there is no evidence in this case that shows that death from hanging, when properly carried out, is anything other than swift and immediate, or that hanging results in any more suffering than that associated with electrocution or other modes of execution." Coleman, 605 P.2d at 1058-59.

result in a slow and/or painful death. Thus the Montana case law simply does not speak to the issues raised here.

In sum, at present only two States -- Washington and Montana -- provide for death by hanging. And Washington itself seems to be on the verge of prospectively eliminating hanging as a means of execution. Just last week the Washington House of Representatives passed a bill which would eliminate hanging as the means of execution for all future capital offenses. House Bill 1043.[2/]

Since only two States now use hanging as their means of execution, hanging is no longer a constitutionally permissible form of punishment. The Eighth Amendment Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 2 L.Ed.2d 630, 78 S.Ct. 590 (1958). The Clause "may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a human justice." Weems v. United States, 217 U.S. 349, 378, 54 L.Ed. 793, 30 S.Ct. 544 (1910).

The Supreme Court has often looked to see how many other jurisdictions authorize the imposition of a particular sentence when deciding whether that sentence is unconstitutionally cruel and unusual. For example, in Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed 345 (1879) the Court concluded that since execution by firing squad was common, it was not unconstitutional. In Coker v. Georgia, 433

[2/] If it passes the state Senate and is signed by the Governor, the bill would not eliminate hanging as the means of execution for petitioner Campbell because his crimes would predate the effective date of the act. See Seattle Post Intelligencer, 2/16/93, p.1 "House Votes to Approve Hanging Ban" and the text of the bill, attached as Appendix A.

U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977), on the other hand, the Court held that since only three States still provided for the possibility of sentencing a person to death for the crime of rape, that the death penalty was unconstitutional as applied to the crime of rape.[10/] See also Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982)(after noting that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to death", the Court concluded that death was an unconstitutionally excessive punishment for felony murder where defendant did not take life, attempt to take life, or intend that a life be taken).

The teaching of these cases is clear. Since only two states presently authorize execution by hanging, contemporary standards of

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10/ "As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for the rape of an adult woman. At no time in the last 50 years has a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. By 1971 just prior to the decision in Furman v. Georgia, that number had declined, but not substantially, to 16 States plus the Federal Government. . . .

Coker, at 593 (emphasis added).

Following the Furman decision, the number of states authorizing a sentence of death for rape dwindled further:

"It should be noted that Florida, Mississippi and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult . . . The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child."

Coker, at 596.

decency, the touchstone of Eighth Amendment analysis, render unconstitutional the use of hanging as a means of execution.

b. If An Evidentiary Hearing Were Ordered, Campbell Could Present Proof that Hanging Often Results in Long, Slow, Torturously Painful Deaths.

Even before the Eighth Amendment was held binding upon the states, the Supreme Court recognized that

> [t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.

Louisiana v. Resweber, 329 U.S. 459, 463 (1947).

Thereafter, in Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) the Court stated: "It suffices to note that the primary concern of the drafters was to proscribe "torture[s]" and other "barbar[ous] methods of punishment." "Punishments are cruel when they involve torture or a lingering death . . ." In re Kemmler, 136 U.S. 436, 447 (1890).

The only appellate court opinion to seriously discuss the issue of whether hanging is a cruel and unusual punishment was Justice Dolliver's opinion in State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). Technically the Frampton decision does not contain any holding regarding hanging as a means of execution, because the majority decision actually held that Washington's former death penalty statute (RCW 10.94.010-.030) was unconstitutional. Accordingly, since no death sentence of any kind could be imposed under the statute, it was wholly unnecessary to decide whether hanging was a constitutionally permissible method of

execution which might be carried out in the future in the event that the state legislature enacted a new death penalty statute.

Frampton was decided 12 years ago. Since then the medical evidence regarding the various possible ways in which hanging can cause death has strengthened the argument that hanging is unnecessarily cruel.

In Frampton Justice Dolliver, writing for three members of the Court, concluded that the medical evidence offered by the prosecution to support the contention that execution by hanging generally results in "immediate unconsciousness" was generally less persuasive than the evidence offered by the death row inmates which indicated that unconsciousness and death often came only after several minutes. He wrote:

> The State's factual presentation on the physiological effects of execution by hanging is contained in two brief affidavits by two pathologists, Dr. Charles P. Larson and Gale E. Wilson. Both conclude that hanging results in severance of the spinal cord and immediate unconsciousness, although Dr. Wilson qualifies "immediate unconsciousness" to mean "a matter of perhaps ten seconds." Although both physicians have impressive credentials and many years' experience in forensic pathology, there is no claim or showing that either expert has participated in any research on judicial hanging. Nor does either cite any medical monographs or treatises in support of his conclusion. . . .
>
> By contrast, the evidence presented by defendants is lengthy, detailed, and supported by persuasive scientific medical research. Our review of this evidence persuades us that in the great majority of cases death by hanging does involve slow, lingering death. Dr. Cornelius Rosse, chairman of the Department of Anatomy at the University of Washington School of Medicine, has reviewed the medical literature on the subject, and concludes that the common belief that death is instantaneous due to disruption of the spinal cord is incorrect in all but a very small fraction of cases. Where death is not instantaneous, its actual cause is probably strangulation or suffocation, a process that can take several minutes.

Frampton, 95 Wn.2d at 493 (Opinion of Dolliver, J.).

Justice Dolliver noted that Dr. Phillip D. Swanson, Chief of Neurology at the University of Washington, had concluded that death would not be instantaneous even if the spinal cord was severed instantaneously, nor would unconsciousness necessarily result. Id. at 494. Similarly, Dr. Harry D. Patton, Chairman of the Department of Physiology and Biophysics concluded that instantaneous death would not result in many cases:

> Studies of remarkably similar lesions encountered in automobile accident victims who suffered forcible high-velocity dorsiflexion of the head on the spinal column (so called "hangman's fracture") have shown that all of the subjects survived, suggesting that such lesions do not sever the spinal cord and indeed seem to produce surprisingly little neural damage. Dr. Patton explains:
>
> > "It seems logical to conclude that the true cause of death in judicial hanging is either strangulation due to tracheal occlusion or cerebral ischemia [compression of the arteries carrying blood to the brain] due to occlusion of the blood supply, -- or both."
>
> Dr. Patton again emphasizes that even a clean severance of the spinal cord "does not per se cause loss of consciousness," and describes experiments where the isolated head of a cat is maintained in a conscious condition after the spinal cord has been severed.

Frampton, at 494 (Opinion of Dolliver, J.)

Justice Dolliver's opinion also relied upon newspaper accounts of Washington executions which documented hanging executions where death often did not come instantaneously, and several cases where death took twenty minutes or more. Frampton, at 495.[11/] Justice

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[11/] Such newspaper accounts are admissible under Fed. R. Evid. 803(16) and 901(8). Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). See Appendix B, a complete listing of Washington State newspaper reports which document the fact that hanging executions in this State have seldom produced instantaneous death, and have often resulted in slow torturous deaths, and Petitioner's Accompanying Offer of Proof filed with this brief.

Dolliver also quoted from eyewitness accounts which related the prolonged suffering endured by some when hangings did not produce the hoped for swift death:

> The May 10, 1910 edition of the Seattle Times described an execution in which it took the victim over 22 minutes to die because of alleged bungling by the executioner. The unfortunate man strangled to death as he pleaded pitifully with the attendants to take him up and spring the drop again. So conscious was he throughout his agony that he was unable to unbuckle the straps that bound his arms and drop the straps to the ground.
>
> A perhaps more shocking and repulsive miscalculation occurred in the execution of Grant Rio in 1951. Albert Rembolt, a former employee at the State Penitentiary at Walla Walla [Washington], witnessed the execution. He recalls that because the rope was left too long, Rio had had his neck cut badly and was partially decapitated when the trap door was opened. Nineteen minutes later Rio was pronounced dead.

Frampton, 95 Wn.2d at 496. See also N. Teeters, Hang By the Neck 173-181 (1967).

Since the Frampton decision, more medical evidence has been developed which confirms the fact that death from hanging is usually slow and painful. This evidence, which petitioner Campbell would present if an evidentiary hearing were ordered by this Court, would reinforce the conclusion that hanging does not invariably cause death by severance of the spinal cord, but may occur in any one of three ways: (1) strangulation, (2) constriction of the carotid and vertebral arteries, or (3)"spinal shock".

In a recent case involving another death row inmate, affidavits from medical experts were produced and submitted to the Washington Supreme Court. Copies of these affidavits are being submitted, along with this brief, as an offer of proof as to the evidence that would be presented if a remand hearing were ordered.

For example, Dr. Deryk Simon James, the Senior Registrar in Forensic Pathology at the Wales Institute of Forensic Medicine, has testified regarding his extensive research into the medical results of "long drop" hangings. Dr. James reports, inter alia:

> Albert Pierrepoint, who had hanged many hundreds of persons, stated that great experience was required to correctly adjust the knot and to determine the drop as a few inches could make the difference between sudden death and slow strangulation.
>
> Several witnessed occurrences support this view. A medical witness, JJ de Zouche Marshall, writing of several of James Berry's executions at the end of the last century claimed that he had caused "intense and needless torture for many minutes" and failed to either fracture the neck or cause unconsciousness. In addition, long drop hanging may result in decapitation as in the case of Robert Goodale or in partial severance of the head as happened to John Conway. . . .
>
> I have examined a series of skeletons of 34 persons executed between 1882 and 1945. These persons had been executed using the long drop method with an average drop length of 7 feet 1 inch. A total of 32 second cervical vertebrae were present of which only 6 were fractured and of these only 2 were in two pieces. The remaining 4 showed only minimal displacement. This was completely out of keeping with the accepted medical dogma that judicial hanging results in a fracture-dislocation at C2/3. No comment can of course be made about the occurrence of dislocation and of brain stem or spinal cord traction, but it is clear that direct trauma to the cord by a fractured vertebra could have occurred in no more the 2 out of 32 of these cases.

Affidavit of Dr. James.

Capital punishment was abolished in England in 1965. However, given the possibility that capital punishment might be reinstated in England, Dr. James has made these cautionary remarks:

> [M]ost modern societies agree that any method of execution should be virtually immediate and painless and the rapidity of any mode of capital punishment is therefore a central issue concerning the acceptability of its use. Should any government re-introduce the death penalty the use of hanging as a suitable means must be seriously questioned.

R.James & R.Nasmyth-Jones, "The Occurrence of Cervical Fractures in Victims of Judicial Hanging," 54 FORENSIC SCIENCE INTERNATIONAL 81, 91 (1992).

Dr. Richard Rapport, a Seattle neurosurgeon, agrees with Dr. James that execution by hanging often produces a slow and painful death. Dr. Rapport explains that since "bone survives and tissue dissolves," generally speaking bones are what are left for forensic examination. If instant unconsciousness is to be produced, the spinal cord must be severed. And severance of the spinal cord, if it occurs, would produce a limpness and lack of motion which is entirely inconsistent with the "dancing" and "twitching" so often observed in cases of hanging:

> But it is the trauma to high cervical spinal cord (not the skeleton) which results in instant loss of consciousness due to "spinal shock" involving the reticular activating formation, the central core of proximal cervical cord and brain stem nuclei responsible for consciousness. . . . The same spinal shock would, ideally, result in complete flaccidity (not dancing) of the trunk, arms and legs. However, the vagaries of human anatomy and physiology as well as the physics of rope, drop and body weight combine to produce uncertainty.
>
> In fact, the ideal of instant unconsciousness and prompt death is not a certainty . . . If death is prolonged, it will likely be a consequence of strangulation, asphyxiation, transection of the great vessels of the neck and/or cerebral ischemia. These issues have been addressed by Dr. Patton's testimony; in all of these circumstances pain and suffering would be both profound and prolonged. Loss of consciousness subsequent to anoxia or cerebral ischemia would take significant time, perhaps minutes, and could be associated with the "dance" described in the literature and eyewitnesses accounts (James, 1992), as opposed to the flaccid condition produced by cord transection and spinal shock. . . .

Affidavit of Dr. Rapport.

Dr. Harry Patton, a Professor of Physiology at the University of Washington Medical School, concurs with Drs. James and Rapport:

> It seems logical to conclude that the true cause of death in judicial hanging is either strangulation due to tracheal occlusion or to cerebral ischemia, that is, cutting off the blood supply to the brian, or to both. How complete the tracheal or vascular occlusion would depend, I should think, on the portion of the noose and the thickness of the neck muscle. The uncertainty and variable consequences of this kind of garrotting is suggested by the reported cases of recovery of victims of hanging who were believed to be dead, some after periods of hanging up to thirty minutes.

Affidavit of Dr. Patton

Other similar affidavits and exhibits are included in Campbell's accompanying Offer of Proof.

3. IT IS NOW TOO LATE TO RAISE A CLAIM OF ABUSE OF THE WRIT; THE STATE NEVER RAISED SUCH A CLAIM IN THIS CASE; AND IN ANY EVENT CAMPBELL HAS NOT ABUSED THE WRIT.

If the issue of abuse of the writ is to be addressed it must first be plead by the State:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's.

McClesky v. Zant, 113 L.Ed.2d 517, 545 (1991)(emphasis added).

In this case the State never plead abuse of the writ. Neither in the District Court nor in this Court has the State ever alleged that petitioner abused the writ with respect to his second habeas petition. Since the State never raised the issue, the issue does not exist, and petitioner has no burden to disprove it.

It is not surprising that the State has never plead an abuse of the writ claim with respect to the means of execution claims. On appeal to the Washington Supreme Court the State took the opposite position that Campbell raised the issue prematurely, and

that he could not properly raise it until after a death warrant setting an execution date had been issued. Since the State argued to that Court that Campbell had raised these issues too soon, the State could not and did not argue that he should have raised these issues earlier. Moreover, even if McClesky were to be overruled, thus permitting the State to first raise the issue of abuse of the writ at this stage of the appellate process, Campbell could clearly meet his burden of disproving any alleged abuse of the writ.

Campbell had cause for failing to include his claims regarding hanging in his first federal habeas petition. Campbell's first habeas attorney, who was appointed one month prior to a scheduled execution date, was not even allowed enough time to read the complete record in the case. Instead, having been deprived of enough time to file a state court petition, he was forced to file a federal habeas petition just two days before the execution date, and was not allowed to include in it any claims that had not been previously mentioned in his state supreme court motion for a stay of execution. Moreover the District Court refused to stay its proceedings on the first habeas petition to give Campbell time to go back to state supreme court to exhaust state remedies on the additional claims which attorney Thoenig discovered as he completed his review of the voluminous record.

Thus it was impossible for Campbell to include his hanging claims in his first federal habeas petition. The State, having taken the position in Campbell I that Campbell could not include any means of execution claims in his first petition, could not now argue that Campbell should have included these claims in his first petition. Nor has the State ever done so. Moreover Campbell

timely raised his claims as soon as the State moved to set an execution date which would result in a hanging. In sum, the State has never claimed abuse of the writ with respect to these claims, and with good reason.

Assuming, arguendo, that the State had made a claim of abuse of the writ, Campbell would also be able to meet the prejudice prong if he could prove that failure to decide the merits of his claims would mean that he would suffer the infliction of cruel and unusual punishment. If his claims do have merit, then he would suffer prejudice from a refusal to hear them. Campbell respectfully asserts that his claims do have merit and that the District Court and the panel were wrong to dismiss his claims without a hearing.

C. CLARIFICATION OF THE CLAIMS RAISED

This Court has ordered petitioner to state "whether his Eighth Amendment argument is limited to hanging or whether it is also addressed to lethal injection." Petitioner responds with these assertions:

(1) Hanging is per se a cruel and unusual punishment.

(2) Directing that the execution be by hanging, unless the condemned chooses lethal injection, is cruel and unusual because it is not consistent with the Eighth Amendment's evolving standards of decency to ask a person to participate in, direct, plan, assist or advise others, regarding their own execution.

(3) Forcing the condemned to suffer hanging unless he "elects" lethal injection violates the petitioner's First Amendment rights because it compels him to violate his own religious beliefs in order to escape the cruel and unusual punishment of hanging.

Thus his Eighth Amendment rights are held hostage by his First Amendment rights.

(4) The Fifth Amendment privilege against self-incrimination is grounded in an Anglo-American common law history that supports the notion that it is fundamentally unfair to induce the condemned to assist in his own punishment, in the same way that it is unfair to ask him to assist in the process of obtaining evidence to secure his own conviction.

(5) Death by lethal injection is not an available option in his case because the statute only permits death by injection when the condemned prisoner chooses it, and he has not done so.

E. CONCLUSION

Petitioner respectfully submits this brief in response to this Court's January 29th order.

DATED this 12th day of February, 1993.

CARNEY BADLEY SMITH & SPELLMAN, P.S.

By James E. Lobsenz
James E. Lobsenz
WSBA No. 8787
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this date I deposited two copies of this Supplemental Brief of Appellant in the United States Mail addressed as follows:

Mr. Paul Weisser, Assistant Attorney General
Mr. John Jones, Assistant Attorney General
Attorney General of Washington
Corrections Division
P.O.Box 40116
Olympia, WA 98504-0116

Dated this 9th day of February 1993.

Luanne Klugman

APPENDIX C

Forensic Science International, 54 (1992) 81 - 91
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THE OCCURRENCE OF CERVICAL FRACTURES IN VICTIMS OF JUDICIAL HANGING

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Summary

Cervical vertebrae from 34 victims of judicial hanging were examined. In only six cases was there a fracture of the axis and only one other fracture was seen in the series. The fractures were of two types. Three were the traditional 'Hangman's fracture' whilst three were of a type previously unreported. The incidence of fracture was unassociated with drop, date age or hangman. The results of the post mortems on these subjects were reviewed and found to be grossly inaccurate with regard to fractures. The results indicate that the traditional hangman's fracture occurred in only a small proportion of cases of judicial hanging. The cause of fractures and cause of death in judicial hanging are discussed with a brief history of judicial hanging in this country.

Key words: Hanging; Hangman; Execution; Cervical fracture

Introduction

Execution by hanging has been practised since early Biblical times [1,2] and was introduced to England by the Angles, Saxons and Jutes following the invasions commencing around 449 A.D., previous to which wrongdoers were flung into a quagmire [3]. Beheading was occasionally preferred for the erring aristocracy and the rather more exotic boiling alive, burning, peine forte et dure, drawing, hanging, disembowelling and quartering and gibbeting in chains were sometimes used to add to the deterrent effect (or entertainment value) of the ceremony, but hanging was the staple of the English executioner's diet for many centuries until the abolition of capital punishment for murder in 1965.

Contemporary descriptions of hangings indicate changing trends in the incidence of hanging, its public appreciation and the techniques employed by hangmen to effect the sentence of the law. From its beginning as a method of slow strangulation with the victim 'dancing' at the end of the rope it developed

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into a more scientific pursuit with successive generations of hangmen striving to attain the perfect execution – 'clean and instantaneous'. Modifications of the length of the drop; the form of the ligature; the thickness of the rope and the position of the knot all took place with varying and sometimes disastrous results.

Whilst public hanging was practised there was no pretence of instantaneous death but after the abolition of public execution in 1868 the rapidity of death is difficult to evaluate as few descriptions are available concerning the private executions since that date. Indeed, from the early part of this century the only information issued, and that by Governmental direction, was a short statement to the effect that 'the execution proceeded without a problem and death was almost instantaneous'. Any 'untoward occurrences' at hangings did not become public knowledge unless one of those present chose to tell the tale. The hangman was not required to be at the inquest following execution and these were brief affairs with frequently only scanty medical input.

The published reminiscences of subsequent hangmen such as Pierrepoint which claim instant death on all occasions are not unchallenged and there are accounts of hangings taking place after the introduction of the long-drop which did not result in a 'clean and instantaneous' death.

The official view, however, has been that properly carried out judicial hanging causes 'almost instantaneous' death due to spinal cord and brain stem trauma subsequent on fracture-dislocation or dislocation of the cervical spine. Indeed, the accepted medical teaching is that judicial execution results in cervical dislocation and the 'hangman's fracture' – a fracture-dislocation at C2 – C3.

This study reviews three series of criminals executed between 1882 and 1945 at three separate prisons by the long-drop method. It catalogues the injuries to the cervical spine, compares the results with the previously accepted medical teaching and attempts to relate them to the method of execution used and to the hangman employed.

Method

The cervical spines of certain convicted murderers executed at three separate prisons between 1882 and 1945 were examined during exhumations of the bodies from the prison grounds prior to redevelopment. Although the graves were unmarked, prison records allowed identification of individual skeletons though many were in a very poor condition due, in part at least, to having been buried in quicklime. The cervical vertebrae were examined for evidence of fractures. Fractures occurring during the exhumation process could be easily distinguished from 'old' fractures by their fresh outlines.

In many cases only scant details were available concerning individual executions and victims. These were supplemented by contemporary newspaper reports which in many cases detailed the name of the hangman, a short statement from the prison governor and an account of the subsequent inquest – sometimes with the postmortem examination results.

TABLE 1

CERVICAL VERTEBRAE FOUND DETAILING FRACTURES IDENTIFIED

	Base of skull	*C1*	*C2*	*C3*	*C4*	*C5*	*C6*	*C7*
Total number	19	30	32	30	23	21	16	9
Number with a fracture	–	–	6	1*	–	–	–	–
% With fracture	0	0	18.8	3	0	0	0	0

*Fracture in congenitally abnormal vertebra.

Results

The base of the skull and cervical vertebrae from a total of 34 bodies were examined. In many cases some of the bones were absent. This was due to the difficulty in recovering all the skeletal fragments from an individual burial and in a few cases bony disintegration had occurred precluding assessment. Fortunately 90% of C1, C2 and C3 were present and in only 6% of cases was C2 absent. The only fractures present were of C2 (6 cases; 19%) and C3 (1 case; 3%) (Table 1).

Two different types of C2 fracture were identified. These were designated as Types 'A' and 'B'. The type 'A' fracture was characterised by a transverse break across the pedicle just posterior to the superior articular facets bilaterally extending into the foramina transversorium and finally across the anterior root of the transverse process. In two cases the anterior roots were intact and complete separation of the anterior and posterior fragments had not, therefore, taken place (Figs. 1 and 2). The type 'B' fracture was characterised by a right-sided fracture identical to the right side of the type 'A'. The left side, however, was fractured in an antero-posterior direction across the superior articular facet immediately lateral to the vertebral body (Figs. 3 and 4).

A single fracture of the body of C3 was seen but this occurred in a congenitally abnormal vertebra; the bodies of C2 and C3 being fused (Fig. 5).

The age range of the executed men was from 19 – 57 and there was no association between the age of the victim and the incidence of fracture.

The executions were performed by a total of seven hangmen who hanged between 1 and 11 persons each in this series. No hangman consistently caused fractures (Table 2).

Postmortem examinations were performed on 21 cases which included 6 fractured C2's. Of these, 2 were identified correctly but the others missed. However, 8 additional 'fractures' were identified at the post mortem which were not confirmed by this study (Table 3). In all, 11 deaths were deemed to be due to cervical fracture, dislocation or a combination of these. One death was attributed to skull fracture (unconfirmed) and cervical fracture/dislocation and the remaining 10

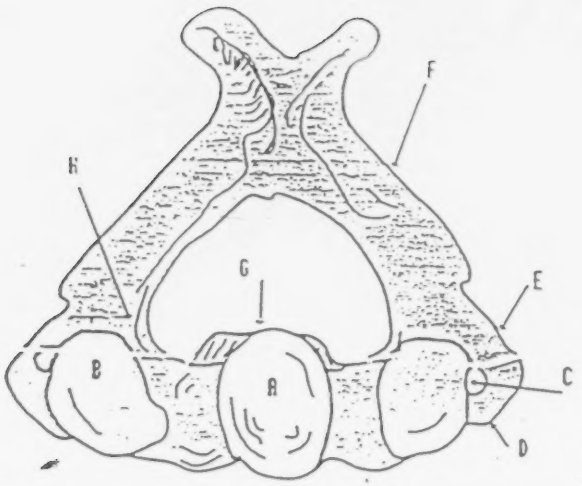

Fig. 1. Type 'A' fracture: A, dentate process; B, superior articular facet; C, transverse foramen; D, anterior root; E, posterior root; F, posterior arch; G, body; H, pedicle.

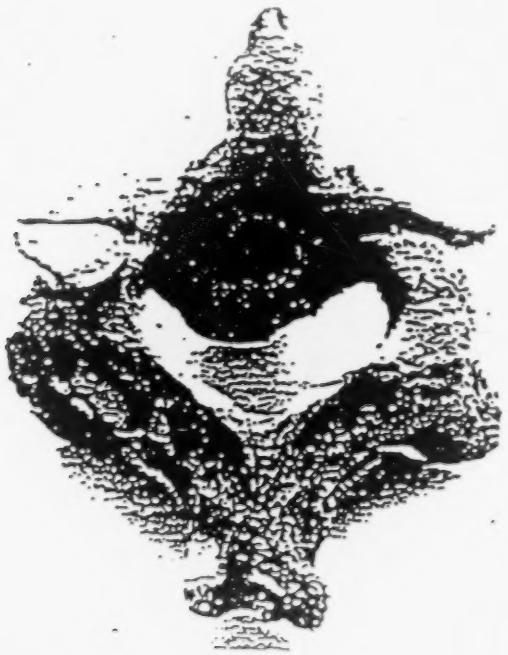

Fig. 2. Type 'A' fracture.

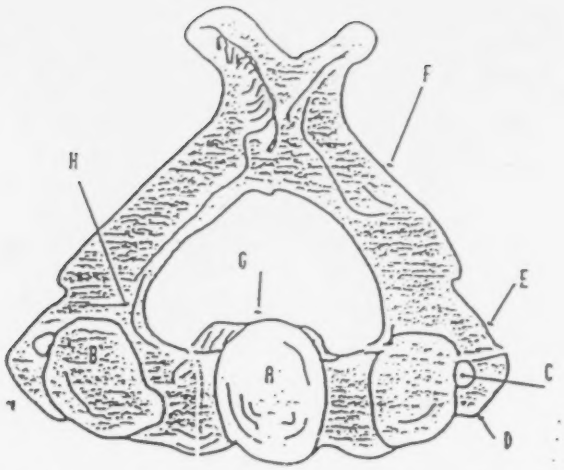

Fig. 3. Type 'B' fracture; A, dentate process; B, superior articular facet; C, transverse foramen; D, anterior root; E, posterior root; F, posterior arch; G, body; H, pedicle.

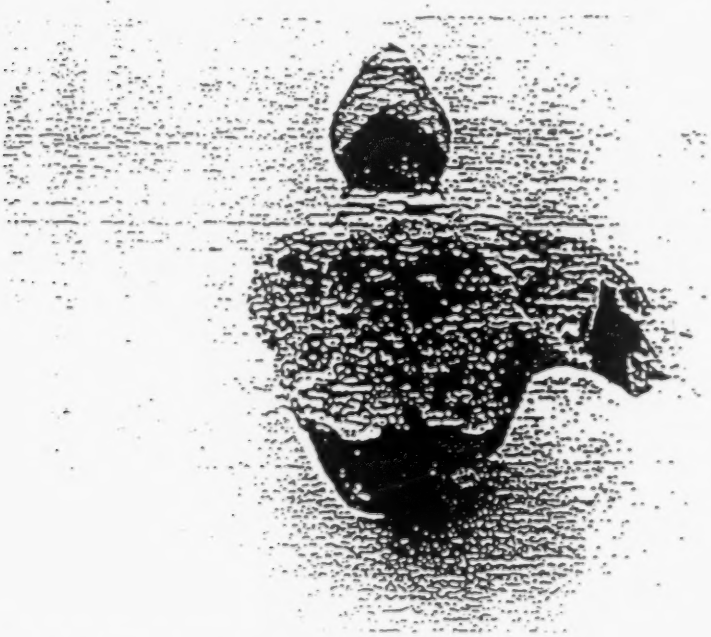

Fig. 4. Type 'B' fracture.

Fig. 5. Fracture in congenitally abnormal C2/C3.

were considered to be due either wholly or partially to strangulation or asphyxia (48%). Two deaths (10%) were considered to be entirely due to asphyxia and strangulation (Table 4).

The length of drop used was known in 19 cases, 3 of which had resulted in a

TABLE 2

THE EXECUTIONERS' RECORDS

Executioner	*1st Hanging in series*	*No.*	*No. with # (fracture)*	*No. with*	
				Type A	*Type B*
Marwood	1852	1	0	0	0
Binns	1883	1	0	0	0
Berry	1884	6	1	1	0
Billington	1892	11	3	1	2
Pierrepoint	1907	6	2	1	1
Ellis	1916	3	0	0	0
Willis	1925	3	0	0	0
Unknown	1937	1	0	0	0

TABLE 3

FRACTURES IDENTIFIED AT ORIGINAL POST MORTEM (PM)

Date	*No.*	*No. with PM*	*No. found at PM*	*Non-existent no. found at PM*
1882–1899	16	11	1/3	3
1900–1919	11	6	1/3	2
1920–1945	7	4	0/0	3

TABLE 4

POSTMORTEM FINDINGS

Postmortem findings	*No. of cases*
Cervical dislocation	7
Cervical fracture	2
Fracture-dislocation	2
Strangulation/asphyxia	2
Cervical fracture + strangulation/asphyxia	5
Cervical dislocation + strangulation/asphyxia	2
Fractured skull	1

TABLE 5

DROP-LENGTH (WHERE KNOWN) RELATED TO INCIDENCE OF FRACTURES

	No.	*No. with #*	*Average drop (all)*	*With #*	*Without #*
1882–1899	15	2	85	69	83
1900–1945	4	1	83	84	83
1882–1945	19	3	85	74 (n = 3)	83 (n = 16)

C2 fracture. The average drop in the non-fracture group was 83" (211 cms) whilst in the fracture group it was 74" (188 cms). No significant difference was seen in the length of drops used throughout the 63-year period of the study (Table 5).

Discussion

The earliest series of excavated victims of hanging are a group of Nubians hanged by the Romans in late Roman-Byzantine times. A total of 101 bodies were identified most with the ropes that hanged them still tied around their

necks. The peculiar feature of these executions is the presence in most cases a fracture across the base of the skull and no cases of any other skeletal injury. This unusual injury may be the result of a particular technique of hanging used by the Romans although the use of a blow to the back of the head to 'finish the victim off' is an alternative possibility. No such fractures were found in this series although it has been previously quoted, on the basis of a single case, to be a cause of death in long-drop hanging by a sub-aural knot [4].

Hangings from Anglo-Saxon times through the middle ages were effected from crude gallows which were often no more than a cross-beam positioned between the branches of two trees. A ladder was placed against the beam and the hangman ascended leading his victim by the rope around his neck which was then fixed to the beam. The victim was then 'turned off' the ladder by the hangman and would frequently struggle violently before succumbing [5]. Such was the method of execution common during the reign of Henry VIII who executed 72 000 of his subjects before humanitarians undertook reforms of this method and from then until around 1759 the ladder was replaced by a cart which was drawn from under the victim thus suspending him without the use of a drop. The noose was of the traditional coiled variety with the knot fixed posteriorly. An alternative apparatus was sometimes used consisting of a platform whose supports could be removed. The most famous of the gallows' was Tyburn's 'triple tree', erected in 1571 and capable of accommodating 24 felons 'comfortably'! It was first used to execute the catholic, Dr Story, who, it is said, having been half-hanged, fought with the executioner as he strove to disembowel him! [6]

Contemporary descriptions of these executions indicate the unpredictable nature of this system. Not infrequently the rope broke, sometimes it even broke twice, as in the case of Captain Kidd in 1701 [7], or the noose slipped from the condemned man's neck as in the case of William Snow in 1789 [8]. The executioner, often a convicted criminal himself, worked in a fierce melee with a frequently hostile crowd. Groups of relatives would push forward to carry off the victim or to pull on his legs in order to lessen his last struggle thus competing with opposing groups attempting to procure the body for dissection [9]. The pages of the Newgate Calendar are full of examples of bungled executions and William Calcraft, hangman from 1829–1874 was much criticised for the mishaps during his executions and for his technique [10]. Despite the introduction of the long-drop in Ireland, where drops of 10–17 feet were used, Calcraft persisted in using only about 2 feet – a distance insufficient to cause cervical dislocation. As a result the victims would struggle violently before losing consciousness and the surgeon to Newgate stated that he had only seen Calcraft cleanly kill one man in 27 years! The law, however, does not say anything about the speed of hanging and as Calcraft said to a man who claimed his freedom after an unsuccessful attempt to hang him 'You're greatly mistaken ... my orders are to hang you until dead. So up you go.' Many cases of hanged men being resuscitated are on record, the most celebrated of which is probably 'half-hanged' Smith whose pardon arrived after he had been suspended for 15 minutes but who nevertheless recovered [11]. Others recovered after having been cut down and 'bled' by a surgeon. These incidents attest to the asphyxial nature of hanging deaths at this time.

The Rev. Prof. Haughton was in the forefront of campaigning for reform of hanging in the mid nineteenth century and, in a series of proposals aimed at causing instantaneous death, called for the introduction of a long-drop with the knot under the left ear or the chin [12]. The former procedure was adopted by Marwood, Calcraft's successor, who tended to use drops of around 8 ft as did his successor, Binns. Marwood adopted the use of a rope which had a brass eyelet worked into one end and through which the other end was passed forming a running noose. The eyelet was held in place by a rubber washer under the left angle of the jaw. This method, which, in this country, remained essentially unchanged until the abolition of hanging, was intended to cause instant death by cervical fracture or dislocation. Berry, who became hangman in 1884, used similar drops until the unfortunate decapitation of Robert Goodale, in 1885, after which he drew up a revised list of drops [13]. Due to public pressure a Commission on Capital Sentences was set up and reported in 1886 on the manner of execution when despite strong petitions for the use of the sub-mental knot, which was claimed to be more effective due to forcible hyperextension, it brought in a new standard list of drops – shorter than Berry's – and recommended continued use of the left sub-aural knot. In 1913 Dr. Frederick Wood-Jones added his voice to those calling for the sub-mental knot stating that the use of the sub-aural knot led to death by strangulation. He claimed that the sub-mental knot was much more effective citing the work of Captain C.F. Fraser, whose series of colonial judicial hangings at Rangoon central gaol by the sub-mental knot all showed a fracture across both pedicles of the axis thus snapping off the posterior arch [14]. This was confirmed by Vermooten, who described C2 fracture, dislocation and cord trauma at the same level when the sub-mental knot was used [15]. However, the use of the sub-mental knot, whilst widespread in the British colonies was never introduced in this country. During this time the art of hangmanship was passed jealously from hangman to hangman – Berry learnt from Marwood; Henry Pierrepoint trained his brother, Tom; Tom trained Albert Pierrepoint and Steve Wade, a later hangman, assisted at many of Albert Pierrepoint's executions. The method of execution including the use of the left sub-aural knot and the lengths of drops, did not change from Berry's time (1884) to abolition. However, Berry experienced at least three major mishaps, including decapitation and failure to hang and, according to J.J. de Zouche Marshall who witnessed several of his executions caused 'intense and needless torture for many minutes' which failed to fracture or dislocate the neck or to cause unconsciousness [16]. Many deaths were attributed at post mortem to asphyxia and many questions have been asked about events at individual executions not least that of Edith Thompson in 1923 which was allegedly a debacle. The hangman involved on that occasion extolled the rapidity of hanging but also said that should there be a 'slight mishap' 'the Government machine goes all out to save the hangman's face. They have to.' [17]. Despite this, in his evidence to the Royal Commission on Capital Punishment in 1949, Albert Pierrepoint claimed a perfect record of instantaneous deaths although he was also insistent that great experience was required to correctly adjust the knot and to determine the drop – a matter of a few inches making the difference between sudden death and slow strangulation [18]. It is interesting to speculate how he knew about the critical nature of the

drop length if he had never witnessed a failure to cause instant death. Moreover, it is surprising in view of this claimed universal success that the famous Sir Bernard Spilsbury, who performed many post mortems on executed men at this time, took it upon himself to investigate judicial hanging and even to suggest modifications of the drop in order to improve its efficacy and the rapidity of death.

It is therefore clear that there is considerable evidence that death in judicial hanging between these dates (and there is no reason to suppose any improvement took place latterly) was not always instantaneous and if contemporary witnesses are to be believed was sometimes drawn out and gruesome.

Whatever the truth about the rapidity of death in modern judicial hanging one thing is shown clearly by this series – the Hangman's fracture is not a single lesion and it only occurs in about 19% of cases. Moreover it does not appear to be related to the length of the drop or to the age of the victim. The type 'A' fracture is the typical 'Hangman's fracture' as described by Wood-Jones and later by Vermooten. The mechanism of this fracture is hyperextension and distraction resulting in cord disruption and a lethal outcome. Whilst seen in orthopaedic practice the 'Hangman's fracture' is then usually due to hyperextension and axial loading; cord damage being much less severe due to the lack of distraction [19]. The type 'B' fracture has not been previously reported in judicial hanging; the assymetrical fracture line may be due to the position of the knot under the left ear.

The results of autopsies conducted are curious in that death was wholly or partially attributed to cervical fracture in 48% of cases (whereas the actual incidence of fracture was 19%). Strangulation or asphyxia was also held to have played a part in 48% of deaths and to have been entirely responsible in 10%. Later autopsies provide conflicting evidence about the incidence of fractures, asphyxia and the rapidity of death. Evidence was given to the Royal Commission on Capital Punishment (1949–1953) by Bentley Purchase stating that of 58 postmortem reports submitted to him, the majority from Sir Bernard Spilsbury, the cause of death was given as fracture-dislocation of the cervical vertebrae with crushing or laceration of the cord in all [20], whilst Vanezis reviewed a series of 19 postmortem reports between 1932 and 1959 and found that some cervical fractures were identified and there was spinal injury in all cases although in 2 cases as low as C4/5. In nearly all cases death was said to have occurred almost instantaneously but in two cases there were signs of asphyxia [21]. If all three sets of post mortems are accurate then they must represent subpopulations of executions implying that the effects of judicial hanging were highly variable. More probably, given that the original post mortems from this series vastly exaggerated the incidence of fracture, none of the series is to be confidently believed.

However, hanging, even without cord damage, usually causes death rapidly either by compression of the carotid arteries, reflex cardiac arrest due to carotid sinus stimulation, venous obstruction or airway obstruction. 'Dancing' on the end of the rope may, in many cases, be decerebrate twitching or 'fitting' rather than struggling and whilst death may not be instantaneous, unconsciousness is probably usually rapid.

In conclusion, therefore, the 'hangman's' fracture was the exception in modern English judicial hanging rather than the rule and death probably resulted most frequently from cord damage consequent on cervical dislocation. The incidence of fractures appears unrelated to the length of the drop or the hangman employed who all used a very similar method of execution. However, despite the undoubted effectiveness of long-drop hanging as a means of causing death, there is persistent controversy regarding its faultless rapidity of action which questions any universal description of the death as being 'almost instantaneous'. This has an important implication: most modern societies agree that any method of execution should be virtually immediate and painless and the rapidity of any mode of capital punishment is therefore a central issue concerning the acceptability of its use. Should any government re-introduce the death penalty the use of hanging as a suitable means must be seriously questioned.

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APPENDIX D

NO. 89-35210

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES RODMAN CAMPBELL,

Petitioner/Appellant,

v.

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents/Appellees.

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Carney Badley Smith &
Spellman, P.S.
2200 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 622-8020

Petitioner submits the following documentary offer of proof regarding the typeof medical and historical evidence which he would present, if given the opportunity, at an evidentiary hearing in the District Court.

DATED this 19th day of February, 1993.

CARNEY BADLEY SMITH & SPELLMAN, P.S.

By James E. Lobsenz
James E. Lobsenz

WSBA No. 8787

Of Attorneys for
Petitioner/Appellant

STATE OF WASH.)
) ss.
COUNTY OF KING)

RICHARD L. RAPPORT, II, on oath deposes and says, I am a physician and surgeon licensed to practice medicine in the State of Washington. I wrote "The Causes of Death by Hanging", a copy of which is attached as exhibit A, in December, 1992. The statements therein are true to the best of my knowledge.

The summary of my training and experience in the curriculum vitae, attached as Exhibit B, is also accurate to the best of my knowledge.

I swear under penalty of perjury of the the laws of the State of Washington that the above statements are true.

Dated this 27 day of December, 1992, in Seattle, Washington.

Richard L. Rapport, II

The Causes of Death by Hanging

Richard L. Rapport, M.D.
Neurological Surgery
Group Health Cooperative
Seattle, Washington

The debate over judicial hanging focuses on the precise mechanism or mechanisms of death, as well as on the details of certain anatomical findings introduced into both medical and legal language. The following comments are a narrow examination of the current neurosurgical understanding of this mode of execution. I have reviewed relevant scientific articles as well as expert testimony on this subject, and have included some personal experience in caring for patients with so-called "hangman's fracture."

As a practical matter, the ideal mechanism of producing death by hanging should be transection of the cervical *spinal cord* at a very high level. Marshall (1888, 1913) believed that this was the case, and contemporary medical teaching describes fracture-dislocation of the *bony spine* at C-2 upon 3 as "hangman's fracture" (James 1992, Schneider 1965). However, the type of bony trauma produced by hanging is largely irrelevant, and the significant issue is the extent of disruption of the spinal cord itself. These topics have been discussed before the court on a prior occasion. I agree with Dr. Fiesse, who concludes that Marshall's hypothesis of the mechanisms of death by hanging are incorrect, that there is lack of information about injury to the spinal cord, and that the type of bony trauma produced by hanging is of secondary importance.

EXHIBIT A

The bony spines have been examined, of course, in several forensic studies of this subject, because bone survives and tissue dissolves, and they are usually what is available to be studied. The more important tissue, the cord itself, is quickly lost for pathologic examination. Furthermore, gross and microscopic evaluation of nervous system tissue is, in general, well beyond the abilities of a non-neuropathologist and helps to explain the many errors which have been reported in the autopsy studies which exist (Jones, 1992). Schneider (1965) first described "hangman's fracture" in civilian populations and noted that "permanent neurologic defect rarely ensues." This has been substantiated in larger series of patients, most recently by Fielding (1989) and Francis (1981). I have cared for several dozen such patients traumatized in accidents, and have never seen a death or significant neurological injury result from a "hangman's fracture." But it is the trauma to the high cervical spinal cord (not the skeleton) which results in instant loss of consciousness due to "spinal shock" involving the reticular activating formation, the central core of proximal cervical cord and brain stem nuclei responsible for consciousness. Without the spinal shock associated with violent high cord transection, as Dr. Patton has noted previously in experimental animals, consciousness can be preserved. The same spinal shock would, ideally, result in complete *flaccidity* (not dancing) of the trunk, arms and legs. However, the vagaries of human anatomy and physiology as well as the physics of rope, drop and body weight combine to produce uncertainty.

In fact, the ideal of instant unconsciousness and prompt death is not a certainty. James (1992) states that 'there is considerable evidence that death in judicial hanging...was not always instantaneous and if contemporary witnesses are to be believed was sometimes drawn out and gruesome." If death is

prolonged, it will likely be a consequence of strangulation, asphyxiation, transection of the great vessels of the neck and/or cerebral ischemia. These issues have been addressed by Dr. Patton's testimony; in all of these circumstances pain and suffering would be both profound and prolonged. Loss of consciousness subsequent to anoxia or cerebral ischemia would take significant time, perhaps minutes, and could be associated with the "dance" described in the literature and eyewitness accounts (James, 1992), as opposed to the flaccid condition produced by cord transection and spinal shock. Raised intracranial pressure might also result, but time would also be required for blood to engorge the intracranial vessels in the presence of obstructed venous return. Not until intracranial pressure was very high and arterial oxygenation low would loss of consciousness be expected; this would require at least minutes. Obstruction to the arterial supply to the brain by occlusion (strangulation) or transection would result in cerebral ischemia and slow coma and death.

I conclude that execution by hanging is inefficient and unreliable. The mechanisms by which death may be produced are variable and subject to both error and miscalculation. The "ideal" result of high cervical cord transection associated with instant loss of consciousness, flaccidity, and prompt cessation of respiration and cardiac activity is unreliably achieved. There is high probability of error and resultant asphyxia, strangulation or cerebral ischemia producing a prolonged and painful death requiring minutes.

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CURRICULUM VITAE

Richard Louis Rapport, II, M.D.

Personal Data:

Born March 21, 1943 Tampa, Florida
Married Valerie Trueblood
Children: Daniel, 1980

Education:

Culver Military Academy, 1957-61
Culver, Indiana

Lawrence University, 1961-65
Appleton, Wisconsin
B.A.

University of Michigan School of Medicine, 1965-69
Ann Arbor, Michigan
M.D.

Postgraduate Training:

Intern (surgery), 1969-70
University of Chicago School of Medicine
Chicago, Illinois

NIH Associate, 1970-72
Applied Neurologic Research Branch
National Institute of Neurological Diseases and Stroke
National Institutes of Health
Bethesda, Maryland

Resident, Neurological Surgery, 1973-78
University of Washington School of Medicine
Seattle, Washington

Military Service:

United States Public Health Service, 1970-73

Licenses:

Washington
Michigan (inactive)
West Virginia (inactive)

Boards:

American Board of Neurological Surgery, certified 1980

EXHIBIT B

CURRICULUM VITAE
Richard Louis Rapport, II, M.D.

Honors and Awards:

Summa Cum Laude (Lawrence)
Galens Honorary Medical Society (Michigan)
North Pacific Society of Neurology and Psychiatry,
Resident prize for best research in neurosurgery, 1974
American Academy of Neurological Surgery,
Resident Award, 1974
American College of Surgeons (Washington),
Resident research prize, 1977

Societies:

American Association of Neurological Surgeons
North Pacific Society of Neurology and Psychiatry

Positions:

Family Practice, USPHS, 1972-73
National Health Service Corps
Glenville, West Virginia

Visiting Lecturer in Neurological Surgery, 1978-79
University of Malaya School of Medicine
Kuala Lumpur, Malaysia
and
Instructor
Department of Neurological Surgery
University of Washington School of Medicine
Seattle, Washington

Staff Neurosurgeon, 1980-
Group Health Cooperative of Puget Sound
Seattle, Washington
and
Clinical Associate Professor
Department of Neurological Surgery
University of Washington School of Medicine
Seattle, Washington

Community Service:

Washington Physicians for Social Responsibility
Founding Board member, 1980
Vice President, 1982-83
President, 1984-85

CURRICULUM VITAE
RICHARD LOUIS RAPPORT II, M.D.

PUBLICATIONS

1. Moore RY, Rapport RL: Pineal and gonadal function in the rat following cervical sympathectomy. Neuroendocrinology, 7:361-374, 1971.

2. Rapport RL, Penry JK: Pharmacologic prophylaxis of post-traumatic epilepsy. Epilepsia, 13:295-304, 1972.

3. Rapport RL, Lancaster FW, Penry JK: Critical evaluation of a computer-based medical literature search and retrieval system. Postgraduate Medicine, 51(5):47-50, 1972.

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11. Rapport RL, Harris AB, Friel PN, Ojemann GA: Human epileptic brain: Na, K ATPase activity and phenytoin concentrations. Arch. Neurol., 32: 549-554, 1975.

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13. Rapport RL, Ojemann GA, Wyler AR, Ward AA: Surgical management of the epilepsies. West. J. Med., 127:185-189, 1977.

14. Rapport RL, Shav CM: Phenytoin-related cerebellar degeneration without seizures. Ann. Neurol., 2:437-439, 1977.

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17. Leal KW, Friel PN, Rapport RL, Wilensky AJ: Pharmacokinetics of primidone in mice after acute and chronic administration. Drug Metab. Disp., 7(5): 345, 1979.

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22. Rapport RL, Tan CT, Whitaker HA: Language function and dysfunction among Chinese and English speaking polyglots: Cortical stimulation, Wada testing and clinical studies. Brain and Language, 18:342-366, 1983.

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25. Rapport RL, Tan CT, Whitaker HA: Fonctions linguistiques et troubles du langage chez les polyglottes parlant Chinois et Anglais, in "La Neurolinguistique du Bilinguisme", M. Paradis and Y. Lebrun (Eds.), pp.57-78, Larousse, Paris, 1983.

26. Mateer CA, Rapport RL, Kettrick C: Cerebral organization of oral and signed language responses: Case study evidence from Amytal and cortical stimulation studies. Brain and Language, 21:123-135, 1984.

27. Puthucheary SD, Rapport RL: Intracranial abscess due to streptococcus milleri: A report of seven cases. Singapore Medical Journal, 23(1):33-36, 1982

28. Mateer CA, Rapport RL, Polly DD: Electrical Stimulation of the Cerebral Cortex in Man, in AA Boulton, GB Baker, M Hiscock (eds) Neuromethods: Volume 15: Methods in Human Neuropsychology. Humana Press, Clifton, NJ. 1990

29. Friel PN, Ojemann GA, Rapport RL, Levy RH, van Belle G: Human Brain Phenytoin: Correlation with Free and Total Serum Concentrations. Epilepsy Res., 3:82-85, 1989

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ABSTRACTS

1. Moore RY, Rapport RL, Vick NA: Pineal hydroxyindole-O-methyl transferase (HIOMT) activity following peripheral denervation. Amer. Soc. Pharm. Exp. Ther. (Fall), 1969.

2. Rapport RL Ojemann GA: Effects of prophylactically administered diphenylhydantoin on the development of chronic cobalt-induced epilepsy in the cat. Amer. EEG Soc., 25th Annual Meeting, 1974.

3. Rapport RL: Prophylactically administered diphenylhydantoin (Academy Award) Amer. Acad. Neurol. Surg., 1974.

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8. Rapport RL: Neurosurgery in Malaysia. North Pac. Soc. Neurol. Psychiat., 1981.

9. Grathaus L, Mescher R, Nov A, Rapport R, Snell P, Wagner E: Is CT always necessary in the evaluation of seizure disorders? West. Neurological Society, 1986.

10. Rapport RL: The Surgical Treatment of Epilepsy. 7th Congress of the Asian Surgical Association, 1989.

11. Shenn DD, Ojemenn GA, Rapport RL, Dills R, Friel P, Levy RH: Distribution of unsaturated metabolites of valproate into human brain:Pharmacologic relevance. American Epilepsy Society, 1989.

STATE OF WASH.)
) ss.
COUNTY OF KING)

HARRY DICKSON PATTON, M.D., Ph.D., on oath deposes and says, I am a Professor Emeritus at the School of Medicine of the University of Washington in the fields of physiology and biophysics.

I wrote a letter dated December 26, 1992, to Jeffrey D. Cohen, a copy of which is attached as exhibit A, in December, 1992. The statements therein are true to the best of my knowledge.

The summary of my training and experience in the curriculum vitae, attached as Exhibit B, is also accurate to the best of my knowledge.

I swear under penalty of perjury of the the laws of the State of Washington that the above statements are true.

Dated this 27 day of December, 1992, in Seattle, Washington.

Harry D. Patton

Harry Dickson Patton

Harry Dickson Patton, M.D.

1717 Evergreen Pl., Seattle, WA 98122

December 26, 1992

Jeffrey D. Cohen
Attorney at Law
656 Colman Building
811 First Avenue
Seattle, WA 98104

Dear Mr. Cohen:

At your request, I am writing this letter to discuss the physiology and mechanics of judicial hanging. As you know, I addressed this issue at the request of Mr. David Middaugh in 1980; however, subsequent scientific research has revealed additional evidence which further supports my previous position.

The traditional explanation for the cause of death in judicial hanging is that the first and second cervical vertebrae are forcibly dislocated. The transverse ligament holding the odontoid process of the axis in place is ruptured, permitting the odontoid process to sever the cervical spinal cord. If this were to occur, the subject's respiration would cease due to the severance of the nerve tracks leading from the medulla, to the cervical and thoracic cord wherein lie the motor neurons supplying the muscles of respiration so that the subject would quite promptly be paralyzed. The subject would then die due to respiratory failure and asphyxia and death would presumably ensue in minutes.

Autopsy data, however, indicate that this kind of dislocation does not occur. Rather, the neural arch of the second cervical vertebrae becomes avulsed, i.e., pulled apart, leaving the connection between the first and second vertebrae intact, the transverse ligament intact, and the odontoid process in place. In fact, this fracture called "Hangman's Fracture" may to some extent protect the spinal cord by decompression, that is, by releasing the cord from the narrow confines of the spinal canal. Unfortunately, autopsy studies are all confined to the bony defect and neglect studies of the spinal cord which, of course, are the critical objects of concern. However, a similar bony fracture with avulsion of the arch of the axis (C2) occurs not infrequently in automotive accidents in which the head is forcibly dorsiflexed. These patients, properly treated, nearly always survive and exhibit little or no neurological damage. It seems clear, therefore, that "Hangman's Fracture", whether produced by automobile accident trauma or by judicial hanging, does not kill by transecting the cervical cord.

It seems logical to conclude that the true cause of death in

EXHIBIT A

judicial hanging is either strangulation due to tracheal occlusion or to cerebral ischemia, that is, cutting off the blood supply to the brain, or to both. How complete the tracheal or vascular occlusion is would depend, I should think, on the position of the noose and the thickness of the neck muscles. The uncertainty and variable consequences of this kind of garrotting is suggested by the reported cases of recovery of victims of hanging who were believed to be dead, some after periods of hanging up to thirty minutes.

One remarkable study on the effects of vascular occlusion was carried out on human volunteers who were subjected to occlusion of the cerebral circulation by a blood pressure cuff placed around the lower third of the neck which could be inflated to pressures of 600 millimeters of mercury. This procedure is believed to have occluded virtually all the blood supply to the head. The mean time required to produce unconsciousness was 6.8 seconds, but the range was from 3.0 to 11.5 seconds. The authors stated that they were able to maintain cuff pressure for up to 100 seconds with full recovery of the subject upon release of the cuff. Comparable data have been reported after cerebral ischemia otherwise produced, as, for example, cardiac arrest. It should be recognized that vascular occlusion occurring in hanging may not be complete. Rossen et. al. point out that the vertebral artery is most easily occluded by pressure in its first portion, where it arises from the subclavian artery, down in the chest, and runs beneath some of the neck muscles upward to lace through a series of foramina in the first six cervical vertebrae. To what extent it is occluded by a noose surrounding the neck is quite conjectural.

Finally, there is the question of simple tracheal occlusion leading to strangulation. The time required to produce unconsciousness and death would undoubtedly be highly variable but certainly a matter of minutes. The degree of obstruction of the airway would depend on the position of the noose and the musculature of the neck. In summary, it appears that the cause of death in judicial hanging is not, as previously believed, the result of spinal cord transection but more likely due to garrotting.

The question of whether hanging is cruel and unusual punishment is, of course, a matter of individual opinion. I suppose the major question is, how soon unconsciousness is produced. As we have seen before, this is quite variable. The point I should make is that uncomplicated spinal transection does not, <u>per se</u>, cause loss of consciousness. This is well documented by the studies of F. Bremer and others on the so-called encephaleisole preparation. This is an experimental laboratory preparation (using a cat) in which, with the animal under a short-acting anaesthetic such as ether, the cord is cleanly transected at the first cervical segment, sparing the major blood supply to the brain. Artificial ventilation is established and the anaesthetic is withdrawn. With care to provide ventilation, nutrition and adequate blood pressure, the isolated head can be maintained indefinitely. Although such

preparations are completely paralyzed, and insensitive to stimuli applied to the body surface, electroencephalographic studies and observation of the eye and lid movement indicate normal sleep/waking patterns of the surviving head, forcing the conclusion that consciousness persists despite the massive withdrawal of sensory input from the trunk and extremities. Parenthetically, I should mention that the use of this preparation is, by common consent, outlawed in this country as inhumane, and scientific journals are not allowed to accept papers reporting studies on such preparations.

I hope that this letter is of some help to you in understanding the process of judicial hanging.

Sincerely,

Harry Dickson Patton, M.D.

CURRICULUM VITAE

HARRY DICKSON PATTON

Personal Data:

Date of Birth: March 10, 1918
Place of Birth: Bentonville, Arkansas

Education:

B.A.	University of Arkansas, 1939, Zoology
Ph.D.	Yale University, 1943, Physiology
M.D.	Yale University, 1946
LL.D.	University of Arkansas, 1984

Postgraduate Training:

1945-46	Research Assistant, Physiology, Yale University school of Medicine
1946-47	Instructor, Psychobiology, Johns Hopkins University

Faculty Positions Held:

1947-50	Assistant Professor, Physiology and Biophysics, University of Washington School of Medicine
1950-56	Associate Professor, Physiology and Biophysics, University of Washington School of Medicine
1956-64	Professor, Physiology and Biophysics, University of Washington School of Medicine
1964-66	Professor and Acting Chairman, Physiology and Biophysics, University of Washington School of Medicine
1966-83	Professor and Chairman, Physiology and Biophysics, University of Washington School of Medicine
1983-present	Professor Emeritus; Physiology and Biophysics, University of Washington School of Medicine

Honors:

Alpha Omega Alpha
Phi Beta Kappa
Phi Eta Sigma
Psi Chi
Sigma Chi

Organizations

American Association for the Advancement of Science
American Physiological Society
International Brain Research Organization
Neuroscience Society

Editorial Responsibilities

Editorial Board, Journal of Neurophysiology, 1961-64
Co-Editor, Ruch-Patton Physiology and Biophysics, 19th Edition, 1961-72, 20th Edition, 1972-83

EXHIBIT B

Special National Responsibilities:

Cultural Exchange Visit in Neurological Science to USSR, Chairman, 1962
USPHS Physiology Study Section, 1962-66; Chairman, 1965-66
USPHS National Advisory Neurological Diseases and Stroke Council, 1966-70
USPHS, NINDS ad hoc Cerebrovascular Training Review Committe, 1966-67
National Board of Medical Examiners
  Physiology Test Committee, 1963-67, Chairman, 1966-67
  Basic Sciences Committee, 1966-67
American Physiological Society
  Council, 1965-71
  Membership Committee, 1964-67; Chairman, 1965-67
  Neurophysiology Group Program Committee, 1963; Co-chairman, 1964
  Public Affairs Committee, 1971
Association of Chairmen of Departments of Physiology, Board Member, 1971
USPHS, NINCDS Chairman, Program Project B Committee, 1975-1979

Special Local Responsibilities:

University
  Publications Council 1952-54
  Faculty Codes and Regulations Committee, 1952-59
  Building Needs Committee, 1964-65
  Advisory Committee for the Selection of a Chairman for the Department of Psychology, 1965-66
  Joint Committee for Graduate Program in General and Comparative Physiology, 1968-73
  Pharmacy Curriculum Committee, 1971-72
  Biology Education Board, 1971-72
  Faculty Senate, 1973-75

Health Sciences
  Nursing Science Committee, 1971-73
  Health Sciences Center Committee on Basic Instruction in the Health Professional Schools, 1972-73

School of Medicine
  Admissions Committee, 1952-55
  Laboratory Materials Committee, 1948-56
  Program Committee for the University of Washington Medical Meeting, 1947-49
  Thesis Committee, 1952-54
  Faculty Awards Committee, 1959
  Appointments and Promotions Committee, 1961-62, 1966-69; 1976-78; Chairman, 1968; Alternate, 1971-72; 1982-83
  Anesthesiology Research Training Advisory Committee, 1962
  Clinical Research Center, Scientific Advisory Committee, 1962
  Basic Science Heads, 1966-83
  Executive Committee, 1966-83
  Steering Committee of the Medical School Executive Committee, 1971-73
  Subcommittee to Study Medical Class Size, 1972
  Ophthalmology Search Committee, 1969-71
  Curriculum, Admissions and Progress Committee, 1972
  Search Committee for Chairperson of Otolaryngology, 1974
  Clinical Curriculum Committee, 1975-76
  Research & Development Committee 1978-79
  Chair, Search Committee for Chairperson of Neurological Surgery, 1981-83

ON THE CAUSES OF DEATH BY JUDICIAL HANGING

By

Cornelius Rosse, M.D., Ph.D.
Department of Biological Structure
University of Washington
School of Medicine
Seattle, Washington 98195

It is commonly held by members of the medical and judicial professions, and by the general public, that instantaneous death occurs in judicial hanging owing to the sudden interruption of the spinal cord at the base of the skull. The origin of this belief may be traced to a hypothesis put forward by Marshall in 1886 (Marshall, 1888,1913). However, to this date the validity of Marshall's hypothesis has not been substantiated by systematic and well documented autopsy examinations. Therefore, the exact cause of death in victims of judicial hanging remains largely conjectural.

The objective of this report is to examine the facts that have been published in the scientific literature pertaining to this question, with the purpose of reconciling these facts with Marshall's hypothesis and with the supposed suddenness of death that is believed to occur in judicial hanging. Although hanging remains the mode of execution in the State of Washington, no hanging has taken place for many years and there has been no opportunity for verifying the precise causes of death by autopsy. Consequently, the piecing together of pertinent existing records is the course to follow.

The Supposed Mechanism of Death

The most recent edition of Gray's Anatomy (Warwick and Williams, 1973) states: "Dislocation of the atlas from the axis, with rupture of the transverse ligament of the atlas and consequent injury to the spinal cord, is the mode by which death is produced in many cases of execution by hanging."

Relevant Anatomy. The first cervical vertebra, called the atlas, is essentially ring shaped and its hollow center, known as the vertebral canal or vertebral foramen, accommodates the spinal cord. Cerebrospinal fluid contained in the meninges surrounds the spinal cord in the vertebral canal,

which is quite roomy in the upper cervical region. The meninges and the fluid act as a water jacket around the cord.

The second vertebra, called the axis, also surrounds a roomy vertebral foramen; the portion of the axis in front of the foramen is bulky and is called the body, whereas the more slender segment of the axis behind the foramen is called the arch of the axis. The atlas is held to the skull and to the axis by ligaments and in turning movements of the head the atlas pivots with the head around a tooth-shaped process that projects upward from the body of the axis. The tooth-shaped process known as the dens or odontoid process fits into the hollow center of the atlas and, in front, is in contact with the inner surface of the ring-shaped atlas. Thus, the vertebral foramen of the atlas accommodates the dens as well as the spinal cord suspended in its water jacket.

The chief structure that prevents the dens from impinging on the spinal cord during movements of the head is the transverse ligament of the atlas, a strong fibrous band that forms a retaining collar around the dens. With the segment of the atlas in front, the ligament encloses the dens in its own ring and prevents its backward displacement, thereby guarding the spinal cord from compression. In certain patients who suffer from rheumatoid arthritis, the transverse ligament of the atlas may degenerate and rupture. The backward displacement of the dens can be demonstrated in these patients when they are x-rayed with the head in certain positions (Rosse, 1980). Although these patients are prone to spinal cord compression, the condition is compatible with life and violent forces are evidently required for the cord to be injured by the unrestrained dens.

Marshall's Hypothesis. In judicial hanging the forces required for causing lethal injury are generated by the sudden tightening of the rope as it checks the drop of the falling body. [The appropriate drop is calculated on the basis of body weight, relying on tables constructed by Haughton (1866)]. After witnessing several executions in England, Marshall observed that the positioning of the knot in relation to the chin was critical for bringing about death rapidly. In 1888 he devised a leather-padded, chin-trough, the function of which was to assure that the knot remained under the chin (submental position) and was prevented from slipping to the side (subaural poaition). In an article in 1913 he reiterated his hypothesis: "I had felt instinctively that by delivering...the upward and backward blow...on the point of the chin, the hinged head would be so rapidly and violently thrown back at the exact second that the posterior segment of the noose struck forward the top of the neck, that the hinge must give way and dislocation take place probably between the atlas and the axis with (as I thought) fracture of the odontoid process of the latter, rupture of the cord, and instantaneous death." (Marshall, 1913). The mechanism Marshall postulates would drive the odontoid process or dens into the spinal cord even if the dens were not fractured, as long as the transverse ligament of the atlas became torn. In the remainder of the article Marshall appeals to the London medical schools to put cadavers at his disposal for testing his hypothesis which he had first proposed 25 years earlier.

This is, then, the basis for the current teaching and beliefs about the cause of death by judicial hanging. The sporadic reports summarized in the next section, in fact, throw considerable doubt on Marshall's hypothesis.

Findings in the Remains of Persons Executed by Hanging and Other Relevant Injuries

There have been numerous instances of survival following judicial hanging. Most of these were "turned off the ladder" rather than hanged by the appropriate drop calculated from Haughton's tables (1866). Some of the more interesting cases were summarized by Robertson (1935) and they are mentioned in this context only to illustrate that hanging by the neck, even though that is coupled with a significant initial drop of the body, is compatible with survival in many instances, though all the victims lost consciousness for varying periods of time. The following account concentrates on objective case reports which are arranged into three groups: 1) reports confined to skeletal and ligamentous structures, 2) reports in which some note is made of nonskeletal tissues, and 3) a group of patients who sustained bony lesions in the cervical spine that were identical with those caused by judicial hanging, although the injuries were caused by motor car accidents.

Group 1: Skeletal and Ligamentous Injuries

a. The skull and cervical vertebrae of two famous criminals, both publicly hanged, are preserved to this day in the Anatomy Museum at the University of Edinburgh. Burke, was executed in 1829 and Dr. Pritchard in 1865. The cervical spines of both are normal; the base of Pritchard's skull is fractured.

b. Wood-Jones (1913) examined the cervical vertebrae of five individuals at the Royal College of Surgeons, London. The bones were sent to him from Rangoon Central Jail, India by Captain Fraser. In the execution of all five cases the knot was submental and a long drop was employed. All had identical bony lesions: the arch of the axis vertebra was snapped off its body, but the

dens remained intact, retained its relationship to the atlas and played no part in causing death. Perplexingly, Wood-Jones concludes: "Death in this series of cases was uniformly instantaneous, for the spinal cord was cleanly severed by the fracture of the neck." Though the description of the fracture is accurate, the conclusion is purely conjectural as only the bones were available for his examination and none of the related soft tissues were preserved. Wood-Jones compared the fracture of the arch of the axis caused by the submental knot to that seen in the skulls of some Nubians and the skull of Dr. Pritchard who were hanged by a subaural knot. He commented on the uncertainty of the causes of death that follow such a skull fracture.

c. In the University of Capetown, South Africa, Vermooten (1921) examined the cervical vertebrae and associated ligaments of four young colored men who were hanged in 1919. Details of the executions were not reported. In all four, Vermooten found fractures of the arch of the axis similar to those described by Wood-Jones, but after meticulous examination of the transverse ligaments of the atlas and other ligaments and joints associated with the dens, concluded that these structures were undisturbed and played no part in causing death. Since his examination took place a long time after the executions, he could not investigate damage done to nonskeletal and nonligamentous structures. With regard to the probable cause of death, he expressed opinions that the spinal cord may have ruptured owing to downward displacement of the body permitted by the vertebral fracture, but this he could not verify by examination.

d. Wolff (1928) reported five similar cases from South Africa and his report confirms the fracture of the arch of the axis with no displacement of the dens.

Group 2: Autopsy Report of Nonskeletal Injuries

The only report dealing with soft tissue injuries produced by judicial hanging is a half page abstract by Paterson (1890). The victim, a 147 pound man, was hanged by a length of a drop of 6 1/2 feet. The arch of the axis was fractured as in the previous cases; there were ligamentous injuries around the second and third cervical vertebrae but the dens and the transverse ligament of the atlas retained their normal relationships. The vertebral artery was ruptured and so was the spinal cord with the surrounding meninges between the second and third cervical vertebrae. Death was due to cord rupture but it is not known whether that occurred simultaneously with the bony and ligamentous lesions or resulted from the pull of the weight of the body.

Group 3: Victims of Motor Car Accidents with Cervical Fractures Similar to Those Caused by Judicial Hanging

Before the relevance of these cases to judicial hanging is explained a summary of the findings in cases of Groups 1 and 2 is appropriate. There is one constant and characteristic bony lesion that is present in those cases of death by judicial hanging in whom force is delivered to the chin. This lesion is bilateral fracture of the arch of the axis. The dens and the transverse ligament, on the other hand, remained intact in all cases examined. The fracture of the arch of the axis may then be regarded as the typical lesion of hanging and it has been called "hangman's fracture."

Schneider et al. (1965) have reported eight cases who were involved in motor car accidents and sustained cervical fractures demonstrated by x-rays that were identical with those found in victims of judicial hanging. In all eight cases it was likely that the fracture of the arch of the axis was produced by hitting the chin on the dashboard, steering wheel or an object

as the victims were thrown from the car. Two of the patients, in fact, had recollections of such an event. In five of the patients there was loss of consciousness with amnesia. Although most of them had some neurologic signs suggesting some brusing or contusion of the spinal cord, complete recovery ensued in all but one case, who continued to have some neurologic signs in one arm.

Conclusions

1. The sporadic records published in the scientific literature over the past 90 years do not support Marshall's hypothesis of the mechanisms of death in cases of judicial hanging.

2. There are no complete reports of autopsies published on victims of judicial hanging.

3. All reports concur in finding normal anatomical relationships with respect to the dens of the axis and the transverse ligament of the atlas.

4. The bony lesion common to all cases of judicial hanging is the bilateral fracture of the arch of the axis.

5. There is notable lack of information about injuries to the spinal cord.

6. Victims of motor car accidents who sustain similar forces in their cervical spine as victims of judicial hanging and who suffer similar vertebral fractures, experience complete recovery, refuting any possibility of permanent damage to the spinal cord by the so-called "hangman's fracture."

7. General public opinion and widely held opinions in the medical and judicial professions about the mechanisms and manner of death caused by judicial hanging are based on conjecture and hypothesis, which have been largely contradicted by the sporadic and albeit inadequate examinations of the remains of victims of judicial hangings.

Speculations as to the Probable Causes of Death in Victims of Judicial Hanging

Since rupture of the spinal cord by the dens can almost certainly be ruled out in the majority of hangings, it must be assumed that death is not instantaneous and results from other causes. Rupture of the spinal cord may be produced by two additional factors:

1. The fractured cervical spine may permit displacement between the second and third cervical vertebrae which may compress or shear the cord. The roominess of the vertebral canal in the upper cervical region and the water jacket of cerebrospinal fluid around the cord may, however, provide considerable protection for the cord, and the nature of the vertebral fracture itself may, in fact, permit decompression of the vertebral canal.

2. Fracture of the arch of the axis and rupture of the associated ligaments will transfer the support of the body weight to soft tissues which may tear with time under the weight. The spinal cord may be included among these tissues and may tear some time after the vertebral fracture has occurred.

Other probable causes of death include:

1. Suffocation due to airway compression, either by the rope or by swelling of tissues around the pharynx.

2. Congestion and edema of the brain due to compression of the veins prior to compression of the arteries. This is more likely in some positions of the knot than in others.

3. Anoxia of the brain due to compression of the arteries.

It is difficult to estimate the time it would take for the victim to die due to causes other than spinal cord rupture. The time would significantly vary because of a number of unpredictable factors.

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